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FEB 13 2012

February 13, 2012

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423

**ENTERED**  
**Office of Proceedings**

FEB 13 2012

**Part of**  
**Public Record**

RE: STB Finance Docket No. 35583; *Eastern Alabama Railway LLC –  
Petition for Declaratory Order*

Dear Ms. Brown:

Please find enclosed an original and ten (10) copies of The Utilities Board of the City of Sylacauga's Reply Statement and Reply to Appeal to be filed in the above referenced proceeding. Three (3) compact discs are also enclosed with electronic copies of the Reply and Exhibits. In addition, please note Exhibits 1, 2, 17, and 18 contain Color images.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Sandra L. Brown

231844

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35583**

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**EASTERN ALABAMA RAILWAY LLC –  
PETITION FOR DECLARATORY ORDER**

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**REPLY STATEMENT  
AND  
REPLY TO APPEAL**

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of the City of Sylacauga*

February 13, 2012

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35583**

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**EASTERN ALABAMA RAILWAY LLC –  
PETITION FOR DECLARATORY ORDER**

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**REPLY STATEMENT  
AND  
REPLY TO APPEAL**

The Utilities Board of the City of Sylacauga (“Utilities Board”) hereby provides its Reply Statement (“Reply”) in the above-captioned proceeding. In this Reply, the Utilities Board shows that condemnation of an easement for routine underground water and sewer pipes across rail right-of-way is not preempted by federal law under 49 USC § 10501. The Opening Statement (“Opening”) filed by EARY barely even mentions the legal issue of preemption in this case, presumably because the legal precedent is so clearly against EARY. EARY’s filings instead try to paint the Utilities Board as a bad actor. However, as shown below, EARY’s unsubstantiated and unverified allegations are false. The Utilities Board’s condemnation action is not preempted and the underground water and sewer pipes do not and will not unreasonably interfere with EARY’s rail operations.

EARY filed an Appeal of the Surface Transportation Board’s (“STB”) January 27th decision on February 6, 2012 (“Appeal”) pursuant to 49 CFR § 1011.6(b), but the Appeal has effectively been mooted by EARY’s filing of its Opening. In any event, out of an abundance of

caution, the Utilities Board also provides herein its reply in opposition to the Appeal pursuant to 49 CFR §§ 1011.2(a)(7) and 1011.6(b). The Appeal is ineffectual, baseless, and does not justify the relief sought. In support hereof, the Utilities Board states as follows:

**I. Summary Of Argument.**

It is not a surprise that EARY has failed to meet its burden of proof in this proceeding. The routine nature of underground utility crossings of railroad right-of-way is an established and undeniable fact clearly in evidence across the country. These routine underground utility crossings, as well as overhead wireline crossings, do not unreasonably interfere with railroad operations. The two underground pipelines that are the subject of this proceeding are no different from the innumerable other underground utility crossings of rail lines in the U.S. These underground pipes, quite obviously, do not interfere with rail operations occurring on the surface. Moreover, on the facts of this case, the evidence can hardly be more clear: one of the two underground pipelines at issue has been in existence for 41 years under the EARY right-of-way, and has not unreasonably interfered with EARY rail operations. In fact, EARY has admitted this fact in sworn deposition testimony.

As the petitioning party, EARY has the burden of proof. 5 USC § 556(d). The unsubstantiated assertions of EARY in its Opening and Appeal have not provided any evidence that interference occurs, let alone that federal preemption should apply. If anything, the Opening and Appeal have merely shown the tenuous and plainly unreasonable position of EARY.

In contrast to EARY's unsupported, undocumented, and unverified allegations of interference, the Utilities Board has provided overwhelming evidence showing that the underground pipelines at issue in this case do not unreasonably interfere with EARY's rail operations, and that preemption does not exist. These arguments and evidence have been

presented in (1) the Reply to Petition filed by the Utilities Board on January 19, 2012 ("Reply to Petition"); (2) the February 7th letter filed by the Utilities Board; and (3) this Reply. No plausible scenario exists whereby these two underground pipelines would unreasonably interfere with EARY's rail operations. Preemption does not apply, and no federal question exists.

## **II. Governing Law.**

As the petitioner in a declaratory order proceeding, EARY has the burden of proof. 5 USC § 556(d). The Utilities Board addressed the law governing preemption in condemnation cases in its Reply to Petition filed January 19th and will not repeat that legal argument here. See Reply to Petition at 7-9. The Utilities Board showed that, under well-established precedent, underground water and sewer pipe crossings of rail right-of-way are considered routine and non-conflicting. Reply to Petition at 9. The Utilities Board asks that the STB incorporate the Reply to Petition as part of the Utilities Board's full Reply to EARY in this proceeding.

EARY's legal position is that all utility condemnation is preempted because EARY has a "an established process for a party to seek permission" to use its property. Opening at 3. However, this assertion is not relevant to the legal issue of preemption. EARY's sole legal argument is addressed on pages 11-12 of its Opening. EARY's Opening lacks any substantive or applicable legal argument on the preemption issue in the context of these underground utility crossings and thus it should be deemed as EARY conceding that the Utilities Board's condemnation is clearly not preempted.

The remainder of EARY's Opening and Appeal is an unsubstantiated delay tactic full of false and misleading statements that the Utilities Board hopes that the STB will not condone.

on this short-line is a single daily hi-rail inspection usually occurring around noon on weekdays. Under EARY's regulations, that hi-rail truck is not suppose to exceed twenty (20) miles per hour and it is supposed to stop wherever the tracks intersect a public roadway. In addition, the proposed Hill Road pipeline crossing is nearly at the end of a dead end section of track, in the right-of-way of a public road that also crosses EARY's tracks, yet this is the location where EARY believes two underground pipelines (one existing and one to be built) do and will unreasonably interfere with its rail operations (even while numerous trucks and automobiles cross the tracks on surface at this same location day and night, apparently without such causing such interference). See Exhibit 2 (showing photographs of intersection of Hill Road where existing and proposed lines run underneath EARY's track, taken on February 6, 2012). EARY's position is simply untenable.<sup>2</sup>

The underground sewer pipeline proposed for the Hill Road crossing will be constructed of concrete-lined ductile iron pipe with constrained joints and have a pressure rating of 350 pounds per square inch. See plan at Ex. 3. The line will not be subjected to any pressure over 15 pounds per square inch because it is a gravity flow sewer, and will only be submitted to pressure if there is a blockage downstream of the bore location. In most instances, the line will not have any pressure at all exerted upon it. The line will be installed inside of a welded steel casing that will extend beyond the railroad right of way on both sides.

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<sup>2</sup> EARY also seems to take the position that the STB is the only entity that can determine whether the engineering of utility crossings can be constructed without interfering in railroad operations. Not only would this mean that the STB could be faced with thousands of utility crossing disputes, it ignores the fact that the Alabama state law requires an assessment on interference (see Ala. Code § 18-1A-72(b)), and state licensed engineers are used to develop plans for installation and maintenance of these crossings all over the United States.

EARY has not even begun to meet its burden of proof required in this proceeding.<sup>3</sup>

EARY has not included any documents or verification to support its assertions of interference

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<sup>3</sup> EARY continues its attempt to add confusion and uncertainty to the simple issue of whether underground pipelines unreasonably interfere with rail operations. For example, in footnote number 1 of the Appeal, EARY accuses the Utilities Board of “backtracking” and “chang[ing] its argument” and, eventually, stating that the “entire surface area” will be used for the underground pipelines at issue. EARY’s accusation is entirely groundless and reveals simply taking phrases out of context, a failure to actually read the Utilities Board’s Reply to Petition, and/or a willful attempt to mislead the STB.

In footnote number 1, EARY ignores the distinction between construction and operation of the second pipeline, as well as the distinction between the proposed Hill Road sewer pipeline and pipelines in general. The misleading quotes in EARY’s footnote 1 are:

- On pages 2-3 of its Reply to Petition, the Utilities Board stated that “[t]he **second pipeline would be constructed...using a method that** would not even require setting foot upon the surface of the EARY right-of-way.” (emphasis added). In the first sentence of footnote 1, EARY omitted the bold language above, thereby creating a misleading quotation. The Utilities Board clearly stated that construction of the second pipeline at Hill Road would not require setting foot on the right-of-way.
- On page 3 (footnote 3) of its Reply to Petition, the Utilities Board stated that “[c]onstruction of some pipelines might briefly require occupying part of the rail right-of-way, but...typically...not the railroad track.” (emphasis added). Again, EARY omitted the bold language above, thereby ignoring the fact that the Utilities Board was discussing construction of pipelines in general, not the specific Hill Road sewer pipeline at issue in this case.
- On page 3 of the its Reply to Petition, the Utilities Board stated that it “would only need to use the surface area to meet its statutory duty to paint-mark the underground pipelines.” With its emphasis on this isolated statement, EARY ignores the fact that this paint-marking occurs during operation of the pipeline, or “[a]fter construction.” Reply to Petition at 18. Contrary to EARY’s allegation, the Utilities Board did not “change[ ] its argument.” Appeal at 4 (n. 1).

It is baffling that EARY would consider the Utilities Board’s statutory duty to paint-mark the pipeline underneath the Hill Road crossing of EARY to be an unreasonable interference with rail operations, when cars and pedestrians have virtually unlimited access to the Hill Road crossing at all times except when a train is passing. Similarly, the assertion that the statutory duty is “undefined” (Appeal at 4, n. 1) is unfounded because the Utilities Board has cited to the specific Alabama statute that requires paint marking. Reply to Petition at 3. Paint-marking of underground utilities is a standard practice and EARY’s attempt to claim that paint-marking has some nefarious, illegitimate aim is troubling. EARY should be ashamed of its oblique insinuation that “EARY and the Board are left to wonder whether the Alabama requirements will require the Utilities Board to impede rail service or pose undue risks.” Appeal at 4 (n. 1). The fact of the matter is that, as part of the condemnation proceeding, the Utilities Board will be

with rail operations, or cited to a single missed customer delivery due to the alleged interference. As the Utilities Board established in its Reply to Petition, EARY's sworn deposition testimony confirms that there is no interference with rail operations from these crossings.

**IV. The Fact that the Parties Have Been Unable to Reach A Voluntary Agreement For the Underground Easement Is Not Determinative On the Legal Issue Of Preemption.**

**A. EARY is trying to use its crossings as a profit center.**

Most of the Utilities Board's crossings of EARY were installed between the 1930's and 1960's. Some were installed even earlier. EARY acquired the line from CSXT Transportation in 2000.<sup>4</sup> RailAmerica acquired control of EARY in 2001.<sup>5</sup> No allegation of interference was ever raised prior to the disputes that have evolved out of RailAmerica's more recent attempt to turn public utility crossings into a profit-making center for the railroad.

Before an application for an underground pipeline crossing is even accepted, a non-refundable payment of \$4000 to RailAmerica is required simply to start the process. See Reply to Petition at Ex. 1. The \$4000 figure includes \$1000 as an Application Fee, \$1500 as the Engineering Review Fee, and a \$1500 Right of Entry Fee. These up-front fees do not include ongoing rent payments that RailAmerica has been dramatically increasing. As stated in the February 7th letter, the Utilities Board has already paid this non-refundable \$4000 fee for the proposed Hill Road underground sewer line.

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required to show that no material interference with EARY rail operations will occur. Ala. Code § 18-1A-72(b).

<sup>4</sup> STB Finance Docket No. 33870, Eastern Alabama Railroad, Inc. – Acquisition Exemption – CSX Transportation, Inc. (served May 19, 2000).

<sup>5</sup> STB Finance Docket No. 34129, RailAmerica, Inc. – Control Exemption – StatesRail Acquisition Corp. and StatesRail, Inc. (served Dec. 28, 2001).

The ever-increasing fees and rents demanded by EARY are apparently part of RailAmerica's announced strategy to dramatically increase revenue from non-rail sources. As part of its Initial Public Offering ("IPO") in late 2009, RailAmerica described its "growth strategy," which, of course, means "growth" in revenue. See RailAmerica, Inc. Prospectus at 3, Registration No. 333-160835 (Oct. 12, 2009), excerpt attached at Exhibit 4. RailAmerica admitted that it wanted to "grow our revenue from non-transportation uses of our land holdings such as...crossing or access rights [and] subsurface rights." The reason for this strategy was obvious:

These sources of revenue and value are an important area of focus by our management as such revenue has minimal associated operating costs or capital expenditures and represents a recurring, high margin cash flow stream.

Id. (emphasis added). In other words, charging fees and rents for crossing easements is a simple and quick way to make money – once such crossings are established, there is very little expense required of RailAmerica, and the cash keeps coming in a "high margin cash flow stream."

The unreasonable fees demanded by EARY have contributed greatly to the multi-year dispute between the parties. Indeed, without these unreasonable fees, the Utilities Board likely would not have needed to resort to condemnation in order to provide utility services. Undoubtedly, this is the whole purpose of giving condemnation authority to government entities such as the Utilities Board; condemnation exists so that the public good is not held hostage to private avarice.

**B. EARY has rejected the Utilities Board's attempts to use the standard RailAmerica application process for these crossing.**

As was made clear in RailAmerica's letter suspending the Utilities Board Application, the agency did attempt to use RailAmerica's standard application for a utility crossing, but RailAmerica refused to process the Application. See Feb. 7 letter at Ex. 1 and 2. Thus, it is

simply incorrect to state that, as EARY did on page 6 of its Appeal, that the Utilities Board would have saved itself considerable time and litigation costs by simply entering into a private agreement with EARY instead of bringing the condemnation action.<sup>6</sup> Appeal at 6. The fact is that the Utilities Board was forced by EARY and its parent, RailAmerica, to file the condemnation proceeding because of RailAmerica's growth revenue plan from a "recurring, high margin cash flow stream."

EARY implies that the Application was not appropriate because it did not conform to certain technical specifications desired by EARY. Opening at 3 (n. 1). This is another red herring. The Utilities Board is willing to abide by the four additional technical specifications included in the EARY suspension letter sent to the Utilities Board on November 7, 2011. In fact, the Utilities Board submitted a revised Application on November 14, 2011 to specifically encompass these four specifications, but EARY has not acted upon the Application.<sup>7</sup> The revised Application is attached as Exhibit 5.

In the spirit of cooperation, the Utilities Board had already agreed to follow these four specifications even though they exceed the detailed publicized RailAmerica specifications. For example, the sewer line proposed for the Hill Road crossing would not be under pressure and,

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<sup>6</sup> It is also disingenuous of EARY and RailAmerica to assert that the Utilities Board should be required to enter into a voluntary agreement for the crossing. First, it was RailAmerica that initiated legal action by filing a complaint against the Utilities Board in September 2009 for back rent. In addition, RailAmerica is fully aware that the parties entered into a settlement agreement to cover all issues. However, RailAmerica subsequently asserted that less than all was covered and breached that settlement agreement. RailAmerica submitted the confidential settlement agreement in its Opening Statement and then appropriately withdrew it.

<sup>7</sup> Just this morning, the Utilities Board received an e-mail finally acknowledging the revised Application and stating that the pipeline could obtain engineering approval with two additional clarifications. RailAmerica's coincidental timing of its response does not moot the preemption issue or the ongoing tactics of EARY/RailAmerica to interfere with the Utilities Board's operations.



consequently, the RailAmerica specifications show that venting is not required. Compare Ex. 6 (pipeline under pressure, with vents) and Ex. 7 (unpressurized pipeline, without vents). Yet, EARY's Application suspension letter of November 2011 mandated venting.

**C. The Utilities Board is willing to pay just and legal compensation.**

EARY further claims that the Utilities Board was unwilling to pay any compensation for the new sewer crossing (Opening at 5), but this is simply not true. The Utilities Board is willing to pay the legally determined amount. In mid-2011, negotiation for the crossing right failed to produce terms that were agreeable to both sides, so the Utilities Board began the preparations to file a Complaint for Condemnation. Under Alabama law, a condemning party must first offer the subservient landowner the diminution in the property's appraised value due to the proposed use of the condemned property. Ala. Code § 18-1A-22. The Utilities Board's appraiser found no diminution in value.<sup>8</sup> In order to be conservative, the Utilities Board offered EARY a small sum for the underground easement right.

As EARY surely knows, the court in a condemnation proceeding determines the legal and just compensation to be paid. Ala. Code § 18-1A-210. In any condemnation case, EARY will have an opportunity to submit its own evidence regarding what it believes the just compensation to be. See, e.g., Ala. Code §§ 18-1A-192 and 195. Therefore, EARY will obtain the legal compensation, as determined by a court of law, for any taking of EARY property by the Utilities Board. Indeed, this is all that EARY is entitled to receive.

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<sup>8</sup> This is not really a surprise. The appraiser found the highest and best use to be a rail corridor both before and after the proposed condemnation. He also found that the underground pipeline did not affect the highest and best use (just as the STB and courts have repeatedly found). Thus, he included no diminution in value. See EARY Opening at Ex. E.

**D. Having forced the Utilities Board to seek condemnation, EARY cannot now claim to want an agreement.**

The Utilities Board and EARY previously agreed upon license agreement terms that would govern all existing and future crossings (see Ex. C of EARY Opening), but EARY has prevented use of those license terms by suspending and refusing to process the Utilities Board's Application for an underground sewer pipeline at Hill Road, stating that it would wait for resolution of the condemnation action first. Thus, the Utilities Board has no other option but to pursue its Complaint for Condemnation and respond to this Declaratory Order proceeding. Now, having forced the Utilities Board to resort to condemnation, EARY cannot reverse course and insist that its application process is the only means for the Utilities Board to gain the access it needs. At a minimum, EARY has waived its right to have this crossing issue come under the license agreement by forcing the Utilities Board to pursue the condemnation action instead.

EARY's actions in regard to the underground Hill Road sewer crossing exemplify the crucial nature of giving public entities the right to condemn property. Eminent domain law exists precisely to prevent private parties from dictating unreasonable terms and demands when the public good is at stake. The whole purpose of eminent domain is so that a party vested with the power to condemn may go forward with that condemnation as long as it meets the statutory and constitutional requirements imposed by the law (including the requirement that it be for the public, not private, good), and not be subject to the whims or unreasonable demands of the landowner – whether they be demands for excessive compensation or other onerous and unacceptable requirements. EARY's argument is nothing less than an attack on the foundation of eminent domain law because it believes that if public entities are able to exercise their right to condemnation, it will undermine RailAmerica's stated corporate strategy of extracting "a recurring, high margin cash flow stream" from public entities through its system of licenses,

permits, regulations, and numerous other fees and charges. See Section V below. These types of condemnation claims are not preempted, should not be permitted to clog the STB docket, and should properly be made to the Alabama courts. The issue before the STB is simply whether 49 USC § 10501 preempts the state law condemnation case – which it undoubtedly does not.

As already stated by the Utilities Board, and in a spirit of cooperation and to ensure safe construction and operation, the Utilities Board will follow specifications of the American Railway Engineering and Maintenance-of-Way Association (“AREMA”) as a minimum, will follow reasonable safety precautions of EARY, and will cooperate with EARY to establish a reasonable timeline for construction. See Reply to Petition at 17.

**V. EARY’s Goal Is To Frustrate The Exercise Of Condemnation By Public Entities.**

Perhaps aware of the insufficient and plainly incorrect nature of its position in this case, EARY has expanded its claims to include an unprecedented attack on the fundamental underpinnings of eminent domain law. The Opening reveals that EARY wants to dictate not just exact pipeline specifications, but also maintenance schedules, Utilities Board employee assignments, employee duties, and virtually all other aspects of the Hill Road pipeline crossings. Appeal at 6; Opening at 9-10 and 15-16. See also Opening, Ex. H at Interrogatories 12 and 13.<sup>9</sup> The breathtaking scope of EARY’s claims exemplifies the reason that public entities such as the Utilities Board have the right to condemn in the first place. Eminent domain exists so that private landowners are not permitted to hold a government entity hostage by dictating unreasonable terms or otherwise acting in an arbitrary or capricious manner when the public good is at stake. Eminent domain is so critical to the functioning of a modern, civil society that

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<sup>9</sup> EARY’s Exhibit H also shows the hollowness of EARY’s claimed need for discovery in this declaratory order proceeding. EARY has already propounded discovery on all or nearly all of the issues raised by EARY in its Appeal.

it is recognized in the U.S. Constitution (in the Fifth Amendment) and enacted as part of the legal code in all fifty states.

In short, EARY is making a collateral attack on Title 18 of the Code of Alabama and the Utilities Board's right to condemn. EARY effectively wants control over the Utilities Board's operations, including design, maintenance, employee scheduling, and technical standards at the expense of the Utilities Board's efforts to provide vital services to the public. The Utilities Board cannot cede this control for a great multitude of reasons, such as the fact that the Utilities Board, not EARY, will be responsible if something goes wrong with any aspect of the Utilities Board's facilities. While, as a responsible public agency and non-profit utility provider, the Utilities Board is willing to consider any reasonable suggestions concerning design or other measures that relate to public safety, it cannot surrender control of its facilities to a third party, particularly one like EARY that lacks expertise in the proper design and installation of the various facilities (wirelines, pump stations, pipelines, valves, etc.) that the Utilities Board would install.

Instead, the Utilities Board utilizes both inside and outside engineers licensed by the state of Alabama to design its facilities. Not only are those individuals licensed experts in their field, but they have specific expertise in both the Utilities Board's systems and the external factors (i.e., terrain, weather, customer characteristics, special hazards, etc.) that are faced by the Utilities Board in Sylacauga. It is unclear whether EARY or RailAmerica have any licensed engineers that trained in water, sewer, electric, and other systems, let alone engineers located in Sylacauga and familiar with the particular circumstances surrounding the Utilities Board's specific facilities and/or operational needs.

These issues were well-illustrated by the Utilities Board's 2010 condemnation described on pages 15 and 17 of the Reply to Petition. In that condemnation, EARY made similar arguments about specifications and maintenance. The probate judge instructed that the Utilities Board submit its plans to EARY and consider any suggestions that EARY had concerning the two water lines that the Utilities Board planned to install. The Utilities Board complied with the Judge's instructions (see Ex. 8) After its review, EARY had only one suggestion, and otherwise said the plans were fine. EARY's one suggestion was to add a second vent pipe because the proposed installation only had one vent pipe. EARY's requested design change, however, was unnecessary in the context of the entire design. EARY's own advisors simply lacked the knowledge to comment upon the plan in an informed manner.

Notwithstanding the statements in the Opening, the Utilities Board has every incentive to, and does operate in a safe and responsible manner. EARY's assertions and insinuations that the Utilities Board has acted in a reckless manner are inexcusable. Unsubstantiated ad hominem attacks do not meet EARY's burden of proof. Further, the fact is that there are existing laws, procedures, and courts to deal with such situations, if they do occur. Therefore, EARY is completely incorrect when it repeatedly alleges that it has "no protection" due to the lack of an agreement with the Utilities Board. See, e.g., Opening at 9 and 15-16. The absence of an agreement does not negatively impact safety or cause unreasonable interference with rail operations. Indeed, the STB's jurisdiction does not extend to contracts, 49 USC § 10709, and, consequently, the STB could not order the establishment of a private agreement between the Utilities Board and EARY. Yet, it appears that EARY is seeking to engage the STB to order that the Utilities Board's only option for its utility crossings is to enter into an agreement with EARY, no matter how unreasonable those terms may be, and based on a series of

misrepresentations and falsehoods claiming that EARY's rail operations and safety are being compromised.

**VI. The STB Should Reject As Misleading The Characterization By EARY Of The Easement.**

EARY continues to fixate upon certain language in the Utilities Board's Complaint for Condemnation, while conveniently ignoring other parts of that document. In particular, EARY erroneously argues that the "on, across, under and over" language of the Complaint for Condemnation inevitably means that the Utilities Board will permanently and completely occupy the entire surface of EARY's right-of-way. Opening at 13. Of course, nothing could be further from the truth. As the Utilities Board explained in its Reply to Petition, this is standard terminology, and the actual use taken is necessarily limited by purpose of the condemnation action in any particular proceeding. Reply to Petition at 13-14 (n. 13). As the Complaint for Condemnation makes clear, the "uses and purposes" for which the easements are to be condemned are "in connection with the construction, operation and maintenance of subterranean water and sewer pipes." See Reply to Petition, Ex. 1 at 2 (Complaint for Condemnation, dated Aug. 23, 2011). In other words, the only rights the Utilities Board obtains are those reasonable and necessary for installing and maintaining underground water pipelines, a use this agency and numerous courts, as well as empirical evidence, have established do not interfere with railroad operations.

In fact, the Utilities Board will have to prove in the condemnation case that its underground pipes will not interfere with EARY's rail operations. The language of the Complaint for Condemnation is necessarily limited by the showing that the Utilities Board will have to make in court. Under Alabama law, the rail line is considered a prior public use, and the Utilities Board's condemnation of an underground easement is not permitted to "materially

interfere” with that use. Ala. Code § 18-1A-72(b). The STB has previously found that courts are competent to determine whether crossings create unreasonable interference with rail operations. Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order, STB Docket No. 34354, slip op. at 2 (served March 3, 2004); Lincoln Lumber Company – Petition for Declaratory Order – Condemnation of Railroad Right-of-Way for a Storm Sewer, STB Docket No. 34915, slip op. at 3 (served Aug. 13, 2007).

Finally, it must be noted that RailAmerica’s own website admits that “utility occupancies” can be “over, under, and on railroad property”, thus effectively admitting that utilities “on” the right-of-way, as a general rule, do not interfere with rail operations. See Exhibit 9. Therefore, the RailAmerica website confirms the well-established STB precedent that routine pipelines do not unreasonably interfere with rail operations.

#### **VII. EARY Has Not Met Its Burden Of Proof.**

EARY has the burden of proof in this case, 5 USC § 556(d), but has not met that burden. It is not entirely clear from the Opening whether EARY believes the condemnation action is categorically preempted or preempted as applied. Regardless, neither type of preemption exists.

The condemnation action clearly does not operate as a categorical pre-clearance or permitting requirement that must be met before EARY can engage in rail operations; EARY’s rail operations would not be interrupted by the court proceeding or the construction and operation of a new pipeline. See Reply to Petition at 14-17. Similarly, the condemnation case does not address transportation matters regulated by the STB.

There is also no “as applied” preemption. In fact, the Alabama condemnation action explicitly requires that the Utilities Board prove no “material interference” with EARY’s use of the right-of-way. Ala. Code § 18-1A-72(b). Hence, far from unreasonably interfering with

EARY rail operations, the condemnation action ensures that EARY's operations will not be materially affected.

**A. No evidence of interference has been provided.**

The key issue in this proceeding is whether the Alabama condemnation proceeding would unreasonably interfere with rail operations, but EARY has not provided any such evidence showing interference with rail operations. There are two pipelines at issue in the condemnation: a pre-existing water pipeline that has been in place for 41 years, and a proposed sewer pipeline. EARY has not provided any evidence that the existing pipeline has unreasonably interfered with EARY operations, nor has EARY provided any evidence that the proposed sewer line would unreasonably interfere with rail operations. To date in this proceeding, EARY has only provided unsubstantiated factual allegations with no supporting verification. In this Reply, the Utilities Board shows that all of these allegations are extremely misleading at best. See Section VII.B.2. Furthermore, the allegations evaporate in the face of the sworn testimony of EARY and RailAmerica employees – testimony which plainly stated that the Utilities Board's underground pipelines do not interfere with EARY rail operations. See Reply to Petition at 14-17.

EARY must make an extremely strong showing to overcome the well-established precedent stating that routine pipelines do not interfere with rail operations. EARY has not even come close to meeting this standard. At some point, EARY must show that its claims are “plausible.” Cf. Ashcroft v. Iqbal, 556 U.S. 662, \_\_\_, 129 S.Ct. 1937, 1949-1951 (2009). Despite making four filings at the STB, EARY has not provided any evidence of interference with rail operations. EARY's filings have consisted of little more than empty assertions and groundless, unverified factual allegations, unsupported by any evidence whatsoever. The STB should find that no preemption exists.



**B. EARY's claims of interference are wholly unsupported.**

**1. The STB should ignore EARY's groundless allegations.**

EARY mentions a number of alleged incidents in an apparent attempt to show that the Utilities Board's existing crossings have allegedly "impeded rail service and posed undue safety risks." Appeal at 4-6; Opening at 6-9. EARY apparently raises these alleged incidents at other crossings to claim that similar incidents are likely at the Hill Road crossing. Nothing could be further from the truth.

The Utilities Board takes safety very seriously. Moreover, EARY has grossly misrepresented and mischaracterized what occurred in many of the alleged incidents. See Section VII.B.2 below. The Board should not give any weight to EARY's unfounded factual assertions – which are not even supported by a verification. Union Pacific Railroad Company – Abandonment Exemption – In Lafayette County, MO, STB Docket No. AB-33 (Sub-No. 297X), slip op. at 4 (served July 22, 2011) (noting that unverified fact assertions may be challenged on the basis of "weight and credibility"). Cf. Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 1190X), slip op. at 5 (served May 17, 2010) (rejecting claim as "too speculative" because it lacked "concrete support"). "The Board's verification rules apply...to pleadings." SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway, Corporation between La Harpe and Peoria, IL, STB Docket No. 33995, slip op. at 2 (served April 13, 2001). In fact, as described in detail in the Utilities Board's Reply to Petition, the sworn testimony of EARY and RailAmerica employees reveals that the underground pipelines do not unreasonably interfere with EARY rail operations. See Reply to Petition at 14-17. EARY has the burden of

proof in this proceeding, 5 USC § 556(d), and it does not meet that burden with unsupported factual assertions made by its counsel.

**2. Correction of the erroneous factual assertions made by EARY.**

Michael Richard, PE, the General Manager of the Utilities Board, and Mitchell S. Miller, PE, Engineering Director of the Utilities Board, have evaluated the factual assertions in the Opening (at pages 6-9) and Appeal (at pages 4-6) and determined that they are unfounded<sup>10</sup>, as described below:

Assertion #1: Alleged collision between EARY contractor and line being strung by Utilities Board across the rail line without notice to EARY (April 2009).

Response #1: Utilities Board employees were sent to investigate a power outage, and they discovered a wire line broken near the EARY track. The Utilities Board did not and could not have known the location of the broken line until investigation revealed the cause of the outage. Immediately after they located the outage, a hi-rail vehicle operated by an EARY contractor came down the rail line very fast.<sup>11</sup> The Utilities Board employees motioned for the truck to stop. This was an emergency situation. Total time on the right-of-way was minutes. An employee of the Utilities Board previously provided an affidavit regarding these circumstances in its 2010 condemnation proceeding, when EARY raised this very same argument to the Alabama Court. See Exhibit 10 (Williamson affidavit).

Assertion #2: Alleged marking by Utilities Board on rail without notice to EARY between MP 467 to 461.5 (Aug. 2009).

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<sup>10</sup> Mr. Richard and Mr. Miller have provided a verification to support this Reply.

<sup>11</sup> In his deposition in the 2010 condemnation proceeding, EARY's general manager testified that EARY's regulations required its outside contractors to travel in hi-rail trucks at speeds no greater than twenty miles per hour for safety reasons. Ex. 11 at p. 44-45. It appears that EARY's contractor was likely in violation of this requirement.

Response #2: EARY's Assistant General Manager, Larry Nordquist, did know of the marking. This marking was done because EARY had asked the Utilities Board to identify the exact locations of its utilities in connection with EARY's demands for increased licensing fees. The Utilities Board stated that it would have to engage in surveying and marking to comply with this request and attempted to do so, after informing EARY of its intentions and receiving no objection. The surveyor also only accessed the right-of-way in daylight hours, when EARY's single train does not even operate. It should also be noted that the Utilities Board's surveyor, as a licensed professional surveyor, is permitted to access the right-of-way under Alabama law. Ala. Code § 34-11-2(d).

Assertion #3: Alleged walking on tracks by "a man who identified himself as an appraiser for the Utilities Board" without right of entry or protective equipment (Aug. 2009).

Response #3: : The alleged incident involving unidentified parties that EARY describes in this paragraph simply never occurred (or, if it did, did not involve the Utilities Board). The Utilities Board did have a licensed appraiser, Bill Bliss, view two locations where EARY's track intersects public roadways in Sylacauga, Alabama in or around August of 2009. This was in connection with the Utilities Board's subsequent condemnation of two water lines underneath EARY's tracks at those locations (the 2010 condemnation). Mr. Bliss, however, never left the rights-of-way of the two public roads, Rocky Mountain Church Road and Oldfield Road, in performing this work. Moreover, he did so during daylight hours, when EARY's single train does not even operate. Finally, Mr. Bliss neither spoke to nor saw any EARY personnel as he stood in this public road way and viewed these areas. It should also be noted that Alabama law addresses this issue by authorizing any entity with the right-to-condemn to enter onto a property for the purpose of doing survey work and/or suitability studies to determine whether the property

is suitable for condemnation. See Ala. Code § 18-1A-50. In other proceedings, EARY has suggested that this law does not apply to it.

Assertion #4: Alleged marking of utility locations by contractors for Utilities Board without protective equipment and without notice (Oct. 2009).

Response #4: See response to #2 above.

Assertion #5: Alleged boring of utility tunnel without regard to (1) customary engineering standards, (2) interference with rail operations, or (3) potential damage (June 2010).

Response #5: The entry and boring was completed for two pipelines pursuant to a lawful court order in the 2010 condemnation described at pages 15 and 17 of the Reply to Petition. Like this proposed crossing, those pipelines were inserted in the public road right-of-way where those roads intersect EARY's rail line, so that the Utilities Board could begin providing water service to approximately thirty families that had previously been dependent on well water. Likewise, EARY's suggestions regarding various "threats" are fiction. As discussed above, the Utilities Board did in fact share its design plans with EARY as part of the condemnation. See Ex. 8. EARY acknowledged that the plans were fine, except to request one change (a second vent pipe) that made no sense and added no benefit due to the specific requirements of the project.

Indeed, EARY's assertions here are in sharp contrast to its statements in the 2010 condemnation action. In sworn testimony, the EARY Assistant General Manager admitted that EARY placed a flagman for the construction but, otherwise, did not even bother to monitor the construction process. Reply to Petition at 17. The Assistant General Manager also stated that there was no interference from the construction process, and that nothing about the pipeline construction causes him concern. Reply to Petition, Exhibit 3 at page 140.

Assertion #6: Alleged notification by Utilities Board to Heritage Plastics of pipe under tracks that needed to be repaired, without notice to EARY (April 2011).

Response #6: The Utilities Board did not provide notice to EARY with respect to the relocation of this water line because this track does not belong to EARY. Nor did this event occur as EARY suggests. Instead, Heritage Plastics owns a private rail spur to its facility, and there are two water lines underneath this private rail spur. Heritage contacted the Utilities Board and informed it that Heritage was building an additional private track parallel to the existing private track. The new track would have interfered with an existing valve on one of the two water pipelines, so Heritage requested that it be allowed to move the Utilities Board's water lines. The Utilities Board approved Heritage's plans to relocate the water line as part of the track construction process. Heritage Plastics, as owner of the land and track, then performed the work complained of in EARY's brief. There was no "repair" of an unprotected pipe involved as EARY claims in its unverified statement.

Assertion #7: Alleged repair of fiber optics line by Utilities Board personnel without protective gear and in violation of 49 CFR Part 214 et seq. (Oct. 2011).

Response #7: The allegation concerns repairs by the Utilities Board to a fiber line that controls the monitoring of a natural gas line. On the morning of October 26, 2011, the Utilities Board contacted EARY about the need to repair a fiber optic line that had been damaged by squirrels. It also informed EARY that this particular line allows the Utilities Board to remotely monitor a high-pressure natural gas line and that it needed to be repaired as soon as possible for public safety reasons. After taking approximately three hours to discuss this request with its "attorneys," EARY contacted the Utilities Board and refused access to the right-of-way. See Ex. 12. EARY claimed it had no obligation to allow the repair because the parties were in a dispute

over an unrelated aspect of their prior settlement agreement. See Ex. 13 (letter from EARY's counsel to the Honorable William Hollingsworth of the Circuit Court of Talladega County). It made this claim even after it had been informed that the Utilities Board needed to repair the line to help monitor its high-pressure natural gas line. See Ex. 12.

Due to EARY's unwillingness to grant permission for the repair, the Utilities Board was forced to file an Emergency Motion in the Circuit Court of Talladega County, requesting access to the EARY right-of-way. See Ex. 12. The judge stated that he could not rule on the motion for procedural reasons, but noted generally that when a fire exists, the fire department does not ask for permission before attending to the fire.

After this hearing with the judge, EARY changed positions, stating that its only objection to allowing the Utilities Board onto its right-of-way for this repair was that the agency's insurance policy did not cover EARY and that it was concerned about liability issues. EARY, however, is a named insured for the Utilities Board's general liability insurance policy, a fact it was aware of at the time. See Ex. 14 and 15. Ultimately, after over twenty-four hours had transpired with EARY refusing to provide access to fix this fiber optic line while the Utilities Board attempted to provide it satisfactory assurances regarding insurance coverage, the agency ultimately decided that it needed to perform the fix without EARY's permission due to the public safety issues from having an unmonitored gas line. However, to placate EARY, the Utilities Board also sent EARY a letter providing explicit indemnification of EARY for any damage occurring while the repairs were being made. Ex. 16. Once the Utilities Board entered the right-of way, the amount of time it spent in the vicinity of EARY's tracks while completing this repair

was approximately five-minutes. This work occurred during daylight hours, when EARY's single train does not even operate.<sup>12</sup>

Assertion #8: Alleged flooding of EARY right-of-way by pipe water leak, causing suspension of train operations (Oct. 2011).

Response #8: The alleged "flooding" is depicted in photographs at Exhibit 17, which show a few small puddles. If rail service was interrupted, that was only due to EARY's decision. The Utilities Board repaired this pipeline with EARY's permission. The Utilities Board never "disclaimed" ownership of the pipe; the Utilities Board was simply unaware that this old pipeline existed prior to October 2011. This pipeline was formerly owned by the City of Sylacauga and transferred to the Utilities Board many years ago. The City did not include any records with the transfer. In the vicinity of this pipe, there are parallel water pipes on both sides of the rail line. See Ex. 18. The Utilities Board assumed water supplied to Machen Drive was from the 24" line, when in reality it was from the 12" line under the pavement of the Old Talladega Highway. It is due to situations like this that the Utilities Board attempted to survey all of its facilities in 2009, a procedure that EARY first consented to and then changed its mind. The Utilities Board has since abandoned the pipe in question.

This incident is also notable because it occurred on the very same day, October 26, as the fiber optic line discussed in Response #7. EARY, however, granted the Utilities Board

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<sup>12</sup> EARY also claims that the Utilities Board has not followed Federal Railroad Administration Regulations. 49 CFR Part 214 et seq. contains regulations regarding railroad worker safety, and the Utilities Board has already stated that it is willing to follow EARY's reasonable safety precautions. Based on the plain language of the cited regulation, it does not appear that the Utilities Board is encompassed in the covered entities which apply to employees of (1) railroads, (2) owners, lessees, lessors, and manufacturers of track and rail equipment, and (3) contractors for railroads. See 49 CFR § 214.5.

permission to fix this small leak on its right-of-way, even while continuing to deny the agency permission to fix the fiber optic line because of purported insurance coverage concerns.

Assertion #9: Alleged presence of Utilities Board employees in “boom” over EARY’s right-of-way (Nov. 2011).

Response #9: The Utilities Board’s employees were neither on nor over the EARY right-of-way during this repair of this overhead wireline. The Utilities Board has survey documents of this area as a result of a process it started in 2009 but then stopped after EARY began objecting in November 2009. When the Utilities Board detected the problem with the wireline in question, it consulted that survey information, confirmed that it would not be on EARY’s right-of-way in conducting this repair and proceeded accordingly. An employee was in a bucket crane behind the pole line and did not breach the EARY right-of-way either in the air or on the ground.

Nevertheless, even assuming that all the incidents alleged by EARY are true (which they are not), these incidents at other crossings are not related to the issue of whether the Utilities Board’s Hill Road condemnation action is preempted by federal law. The incidents do not show that the Hill Road condemnation case will cause any unreasonable interference with rail operations. First, these alleged incidents relate to other crossings, not the crossings in the current condemnation proceeding. Second, the allegations are unsubstantiated, false, and misleading.

EARY filed its Petition for Declaratory Order over seven weeks ago, but has not yet cited to a single precedent finding that underground utility pipelines unreasonably interfere with railroad operations. EARY has not responded to the ample legal precedent cited by the Utilities Board on this exact issue (see Reply to Petition at 9), precedent which found that routine utility easements such as underground pipes do not unreasonably interfere with rail operations.



### **VIII. The Appeal Should Be Denied.**

Given that EARY has already filed its Opening, the Appeal is now moot. Nevertheless, the Utilities Board shows that the Appeal was and is meritless.

#### **A. Standard of Review.**

“Appeals are not favored.” 49 CFR § 1011.6(b). They will be granted “only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” 49 CFR § 1011.6(b). When a party appeals a decision of a STB employee, there is a “high bar.” James Riffin – Acquisition and Operation – Veneer Spur – in Baltimore County, MD, STB Docket No. 35246, slip op. at 5 (served Feb. 4, 2011) (“James Riffin – Veneer Spur”).

#### **B. The relief sought in the Appeal would waste limited STB and Utilities Board resources.**

In filing the Appeal, EARY has continued to waste the limited time of the STB, time that is much better spent on real disputes about application of federal law. Instead, the STB is being forced to consider an issue that has long been settled – whether underground sewer and water pipes, providing vital public services, unreasonably interfere with rail operations. Obviously, no unreasonable interference does exist, and EARY’s repeated attempts to claim otherwise are simply a waste of resources. The Utilities Board is a non-profit governmental entity created by the Alabama legislature; it does not have deep pockets to fund endless and pointless litigation. EARY’s efforts to extend this already unnecessary proceeding with discovery and a long, drawn-out procedural schedule would force the Utilities Board to expend a significant sum on legal costs.

EARY has not shown the exceptional circumstances which are required for granting the Appeal, and no legal precedent was cited in support of the Appeal. Instead, EARY has merely made plainly incorrect factual assertions while continuing to ignore the established legal

precedent on this issue. See Section VI above. The STB should reject EARY's misrepresentation, obfuscation, and attempt to create confusion and uncertainty where none exists. The simple fact is that condemnation of an easement for underground pipelines does not unreasonably interfere with railroad operations.

The Appeal is part of EARY's continuing and unprecedented effort to disrupt, prevent, and/or profit unreasonably from the routine activities of a small-town public government utility providing essential services to its citizens. The sewer and water pipelines that are the subject of this proceeding are not dissimilar from thousands of other such pipelines across the nation, providing crucial water and sewer services to individuals, schools, institutions, and businesses. The STB has already repeatedly found that routine utility easements do not unreasonably interfere with railroad operations<sup>13</sup> and, consequently, the STB should reject the Appeal and move forward expeditiously to a final decision in this case. Further extension of this proceeding would only further waste the limited resources of the STB, not to mention those of the non-profit Utilities Board.

**C. Discovery is not warranted.**

Apparently the only justification for EARY's opposition to the procedural schedule previously adopted by the STB is that EARY wants to engage in discovery. It is obvious, however, that discovery is neither warranted nor necessary in this case. Since filing its one and half page Petition for Declaratory Order ("Petition") on December 16, 2011, EARY has made no indication that it believed discovery was necessary. Indeed, the Petition itself was almost entirely a description of the procedural posture of the condemnation case, and provided not even a hint that EARY believed there were factual disputes necessitating discovery. EARY waited

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<sup>13</sup> See Reply to Petition at 9.

seven weeks before raising the issue of discovery. EARY's actions suggest that discovery is not really needed or desired, but has only been raised as a last-ditch effort to support the fatally flawed Appeal and cause further delay.

EARY's description of its purported "discovery topics" confirms the baseless nature of the discovery request. EARY states that it would request the Utilities Board's "construction plans, safety measures, technical specifications, schedule, the engineering requirements of the pipeline, and whether the Utilities Board has the benefit of sovereign immunity." Appeal at 6. The first five discovery topics mentioned by EARY consist entirely of information that EARY could obtain in the appeal of a probate court condemnation decision if interference was really an issue or that the Utilities Board would provide EARY as part of the consultation to build the sewer line. The Utilities Board has already stated to EARY previously and in this very proceeding that it would (1) comply with standard specifications of AREMA; (2) follow reasonable safety precautions of EARY; and (3) cooperate with EARY to schedule its construction activities. Reply to Petition at 17. In other words, the "construction plans, safety measures, and schedule" will be those determined as a result of reasonable cooperation between EARY and the Utilities Board. The "technical specifications" and "engineering requirements of the pipeline" will be, at a minimum, the standard specifications established by AREMA and used across the country. Any further attempt by EARY to dictate the operations of the Utilities Board would impermissibly act as an attack on the entire purpose of eminent domain. See Section V. Finally, the sixth discovery topic – "whether the Utilities Board has the benefit of sovereign immunity" – is a purely legal issue, and is not appropriate for discovery. In short, there are no "substantive transportation issues" in play, and discovery is not appropriate. Illinois Central

Railroad Company – Construction and Operation Exemption – in East Baton Rouge Parish, LA,  
STB Docket No. 33877, slip op. at 2 (served Aug. 21, 2001).

No factual matters are in dispute. Construction of water and sewer pipelines underneath rail rights-of-way is commonplace in the United States, such that innumerable such crossings already exist across the country. Standard specifications exist for such pipelines, and the Utilities Board will cooperate with EARY on scheduling and will comply with EARY's reasonable safety precautions. EARY has not shown that discovery would have the remotest possibility of affecting the outcome of this case.

Despite the lack of factual dispute, EARY tries to justify discovery through an insinuation of devious schemes on the part of the Utilities Board. EARY claims discovery is necessary so the STB can "ascertain the Utilities Board's true intentions." Appeal at 6. It is not clear what EARY has in mind by raising the spectre of hidden "intentions", other than EARY's desire to obfuscate and create confusion where none exists. The Utilities Board has no hidden agenda. It is a non-profit governmental entity in a small town in Alabama. It provides vital services such as electricity, water, and sewer service to citizens, institutions, schools, and businesses in its service area. The Utilities Board has an open record policy that bars it from keeping information and documents confidential with the exception of a few statutory exclusions not applicable here. See, e.g., Water Works and Sewer Board of Talladega v. Consolidated Publishing, Inc., 892 So. 2d 859 (Ala. 2004) (holding that the Alabama Public Records Act, Alabama Code 41-13-1, applies to municipal corporations like the Utilities Board and discussing the limited exceptions to it). In short, it does not have the ability to create a secret, devious plan.

With its proposed discovery topics, EARY has revealed that its main goal in this case is to get the STB mired in the exact technical specifications that are required and reasonable for an

“right” to discovery. The Utilities Board is not in charge of EARY’s litigation strategy, and EARY waited seven weeks before even raising the issue of factual matters or mentioning the possibility of discovery. Proceedings before the STB are adversarial in nature. Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42071, slip op. at 2 (served Dec. 13, 2004). Each party is responsible for taking the steps necessary to protect its interests. United States v. Rivas-Macias, 537 F.3d 1271, 1281 (10th Cir. 2008); Ackermann v. United States, 340 U.S. 193, 197 (1950). EARY cannot disclaim responsibility for its own strategic decisions.

EARY also accuses the Utilities Board of “gam[ing] the process”, but this could not be further from the truth. Counsel for the Utilities Board was still becoming familiar with the relevant facts of the case and the need for expeditious treatment of this case at the time that the Motion for Extension of Time was filed in late December 2011. There was nothing underhanded in the Utilities Board’s request for two weeks to consult with newly-hired counsel, inform counsel of the relevant facts, and prepare the reply to the Petition for Declaratory Order.

EARY makes the remarkable assertion that the Utilities Board is trying to take EARY’s property without compensation, but this is obviously not true. As EARY surely knows, the whole point of the eminent domain law is to provide just compensation to the landowner when there is a necessary public use for the property. In the Alabama condemnation case, EARY will be compensated for the property interest taken by the underground pipelines. Ala. Code § 18-1A-170.

Finally, EARY states that it is willing to participate in mediation or meetings with the STB Rail Customer and Public Assistance Program. As an initial matter, the issue before the STB is whether preemption exists or not, and it is unclear how mediation could assist the

determination of the preemption issue. In any event, it was EARY that suspended the Utilities Board's application for a utility occupancy. See Exhibits 1 and 2 to February 7th letter. Moreover, the parties have already engaged in extensive negotiations and entered into a settlement agreement which EARY has now breached. Mentioning mediation now for a small part of a dispute covering many larger issues suggests that EARY's true aim is not resolution, but delay, obfuscation, and forum shopping. In light of EARY's actions to turn these utility crossings into profit making centers, the only true low-cost resolution is to allow the Alabama courts to adjudicate the condemnation case, evaluate EARY's claims of interference with rail service<sup>14</sup>, and award just compensation to EARY for the underground pipeline crossing.

**X. Conclusion.**

The Utilities Board's pending condemnation action is not preempted by federal law under 49 USC § 10501. The condemnation action concerns two underground pipelines, one proposed and the other that has existed for 41 years. Neither the construction of the new pipeline nor the operation of either pipeline results in or would result in unreasonable interference with EARY rail operations. The Utilities Board respectfully requests an expeditious decision on the preemption issue for the reasons stated in the Reply to Petition.

Appeals are disfavored, and EARY has not shown the exceptional circumstances necessary to justify the Appeal, especially given the obvious fact that underground pipelines do not unreasonably interfere with rail operations. The Appeal should be denied.

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<sup>14</sup> The STB has previously found that courts are competent to address claims that crossings interfere with rail operations. Maumee & Western, slip op. at 2; Lincoln Lumber Company, slip op. at 3.

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February 13, 2012


Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra L. Brown", is written over a horizontal line.

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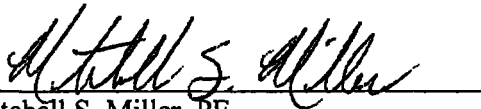
**VERIFICATION**

I verify under penalty of perjury that I have read the foregoing Reply Statement and Reply to Appeal, filed by the Utilities Board of the City of Sylacauga in STB Docket No. 35583, that I know the facts stated therein, and that the same are true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this verification.



Michael Richard, PE  
General Manager, Utilities Board of the City of Sylacauga

Executed on 2/10/2012



Mitchell S. Miller, PE  
Engineering Director, Utilities Board of the City of Sylacauga

Executed on 2/10/2012



**CERTIFICATE OF SERVICE**

I hereby certify that this 13th day of February 2012, I served a copy of the foregoing upon counsel for defendant EARY as described below:

Via U.S. first class mail, postage prepaid,  
and electronic mail:

Louis E. Gitomer, Esq.  
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Lou@lgraillaw.com

Via U.S. first class mail, postage prepaid:

Scott G. Williams, Esq.  
Senior Vice-President & General Counsel  
RailAmerica, Inc.  
7411 Fullerton Street, Suite 300  
Jacksonville, FL 32256

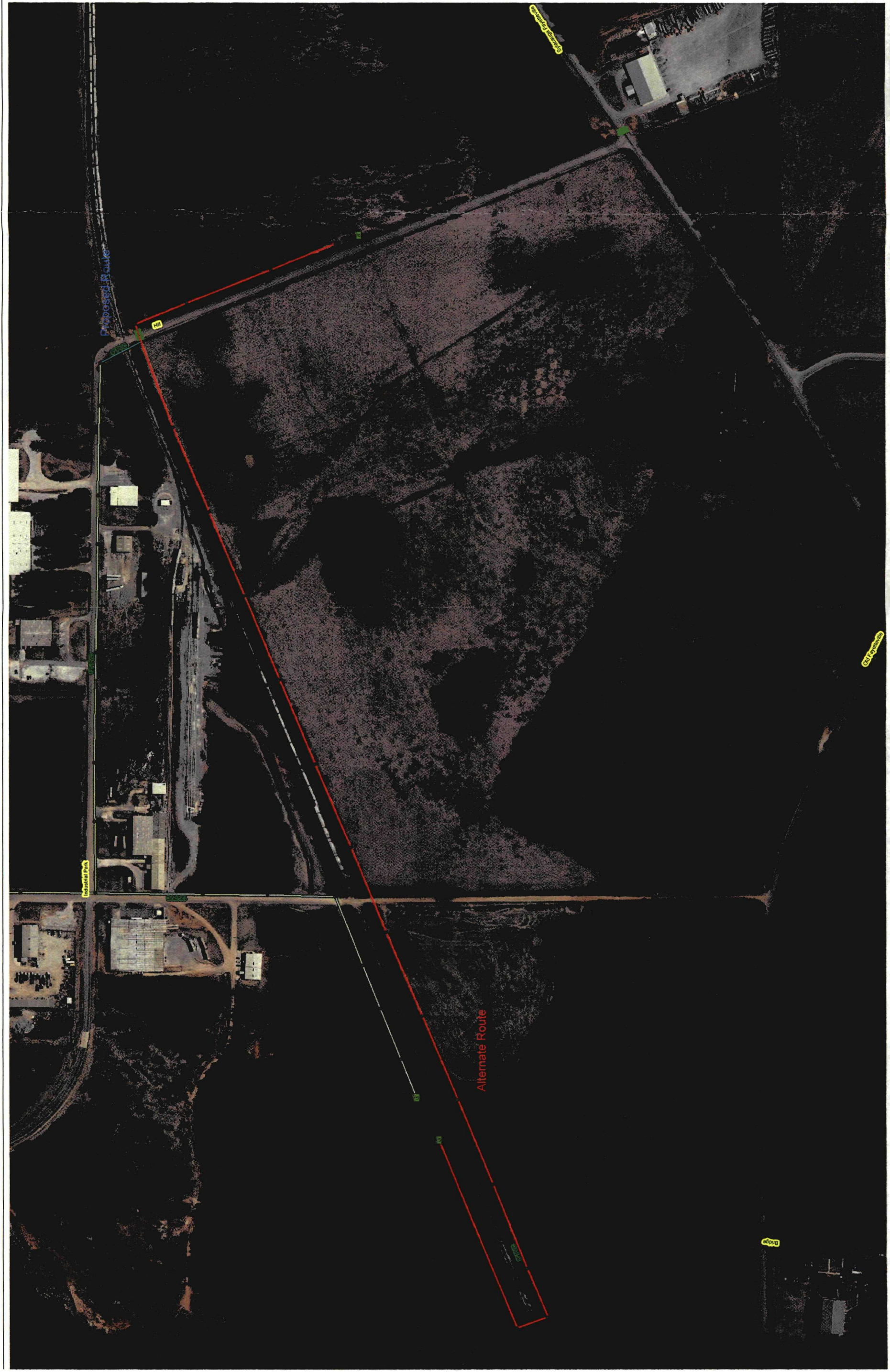
*Counsel for Eastern Alabama Railway LLC*

  
\_\_\_\_\_  
David E. Benz

# EXHIBIT 1

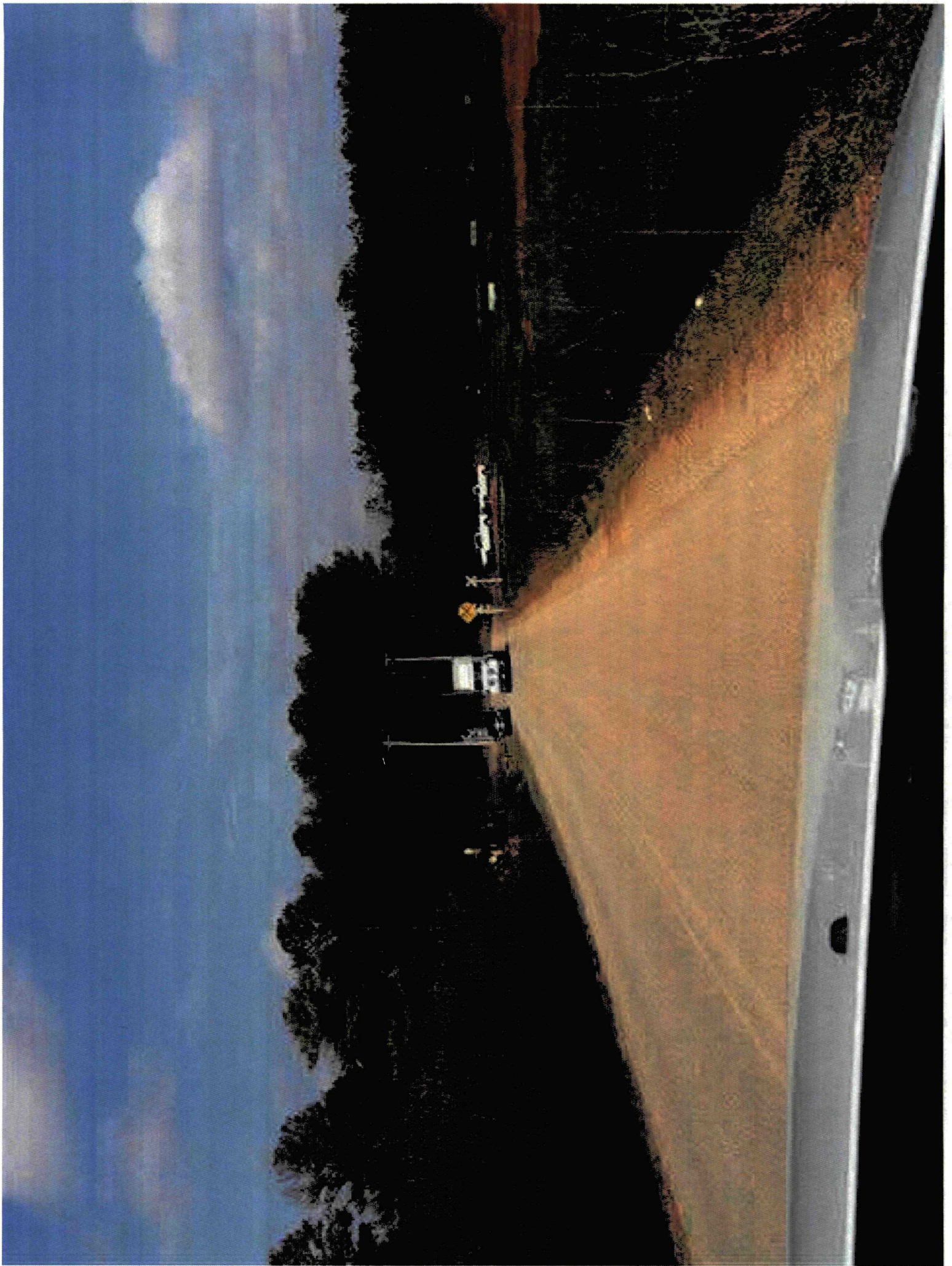


# IKO Sewer Proposal

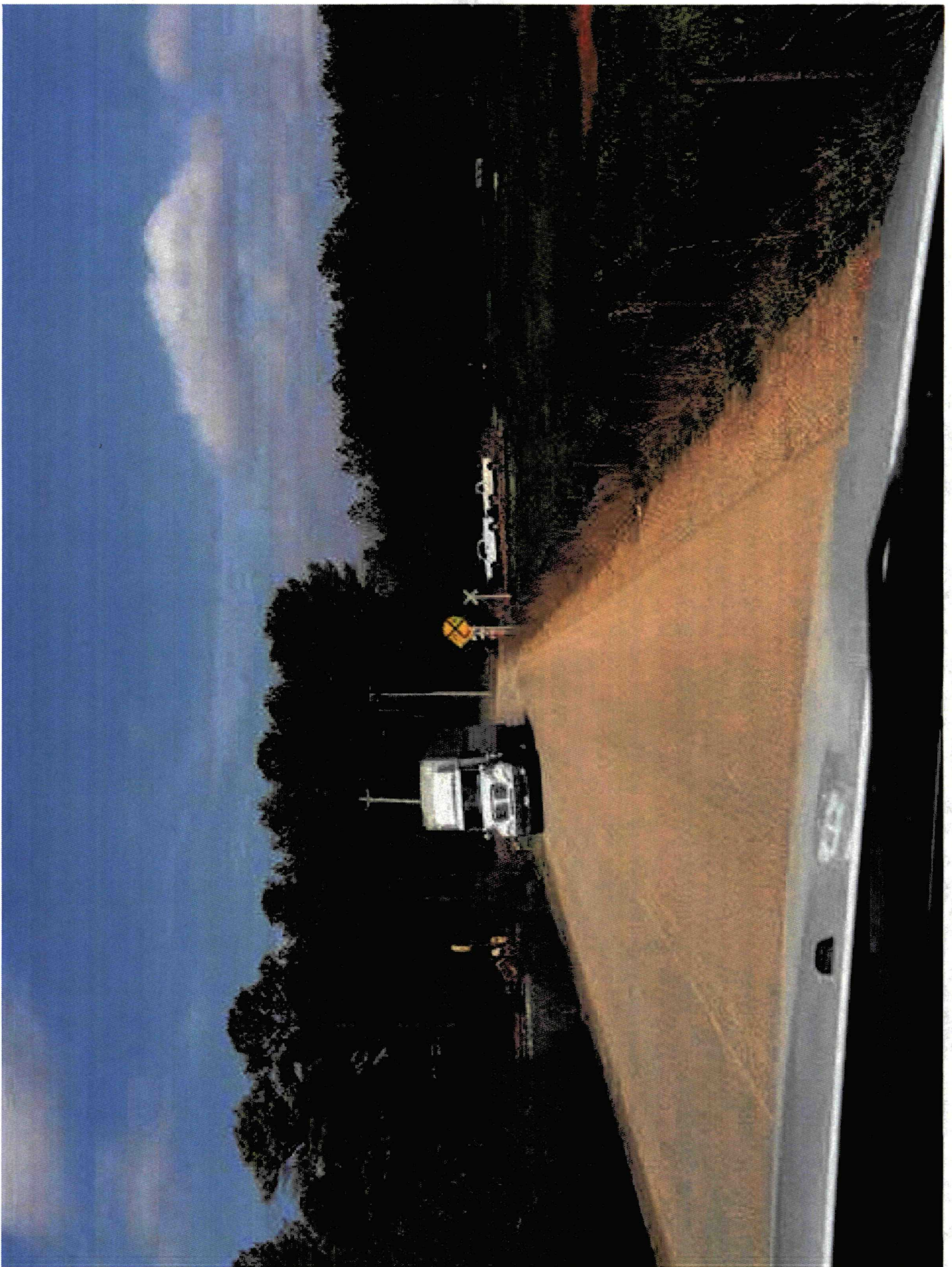




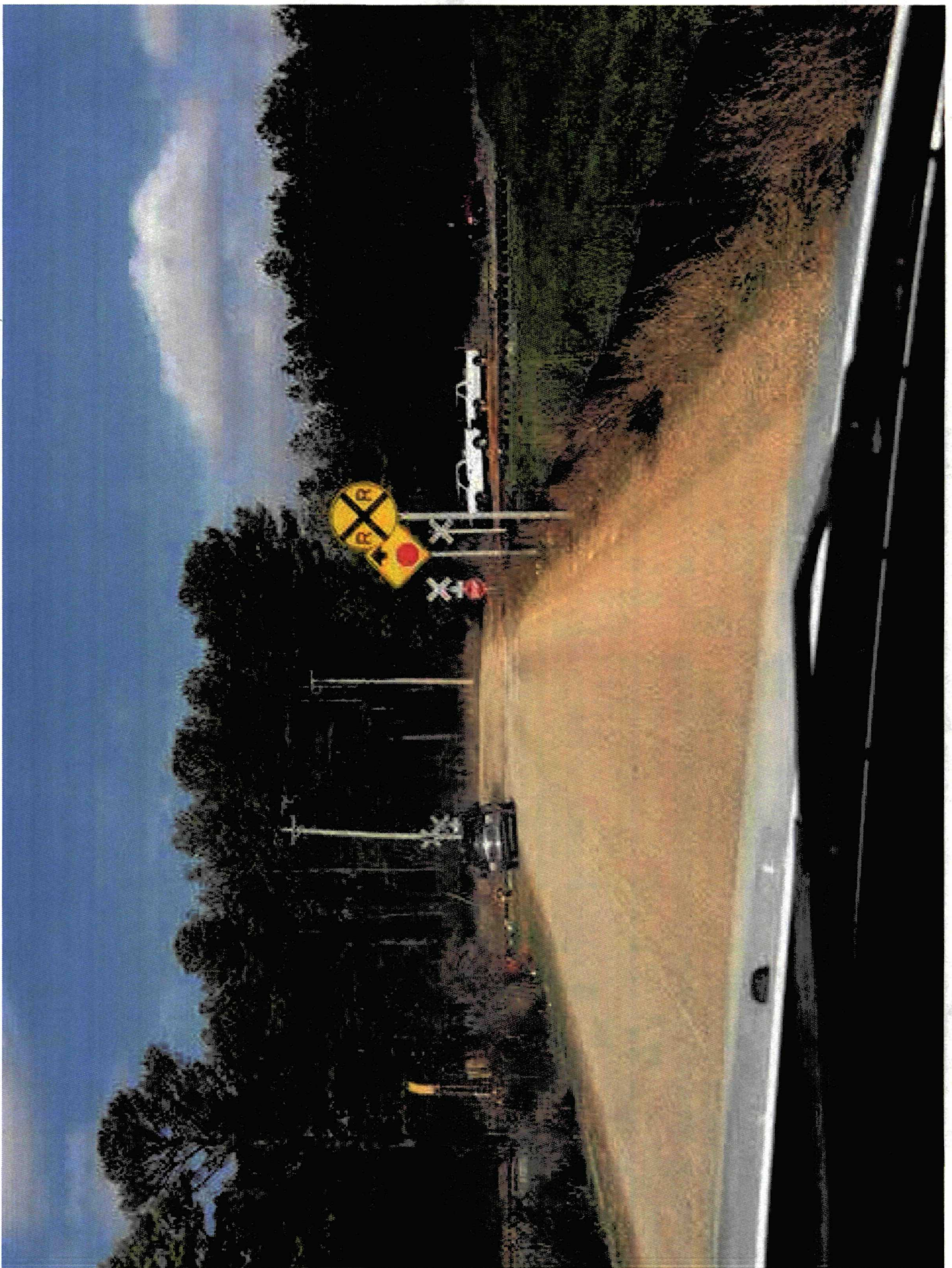
# **EXHIBIT 2**



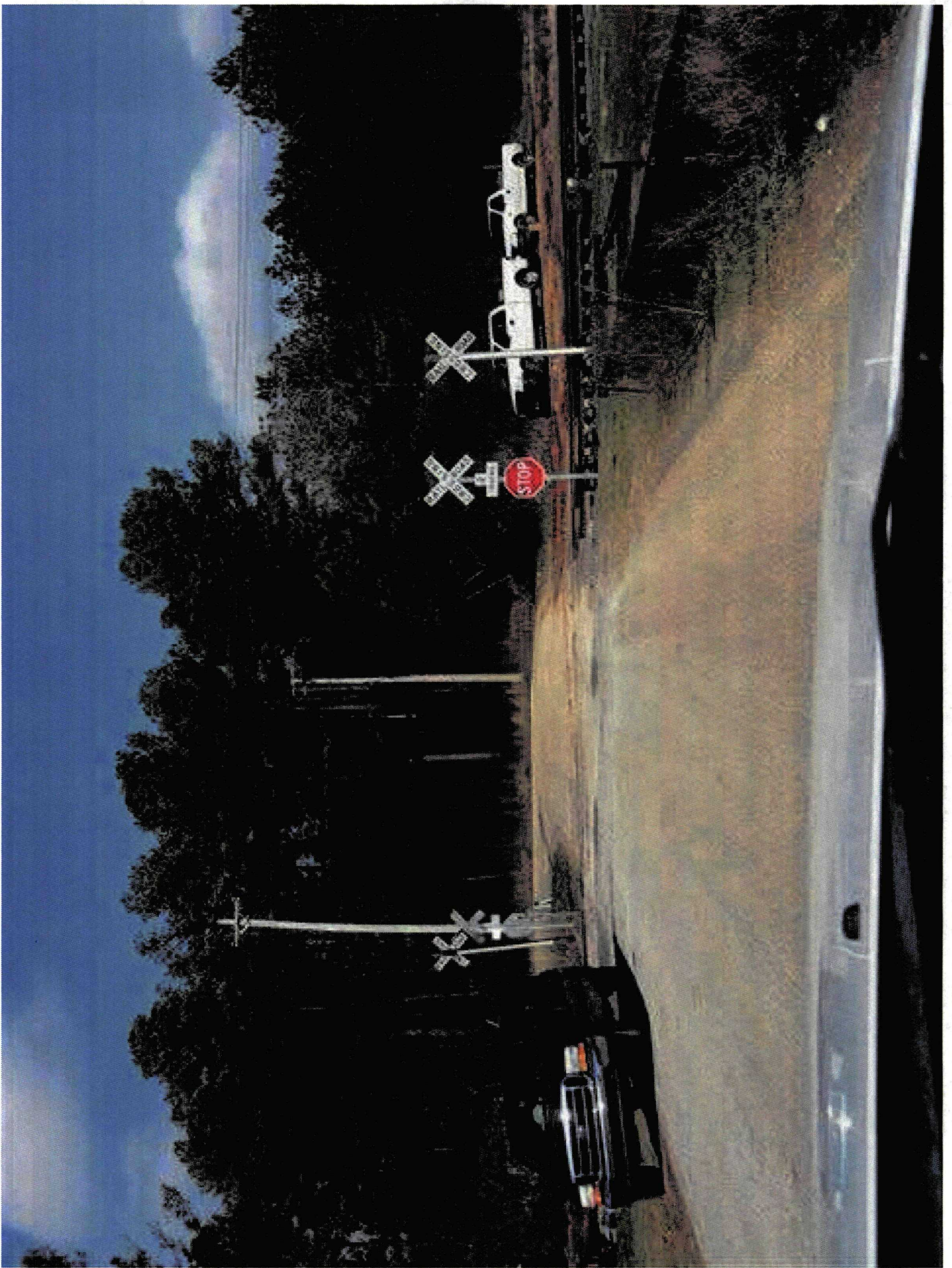




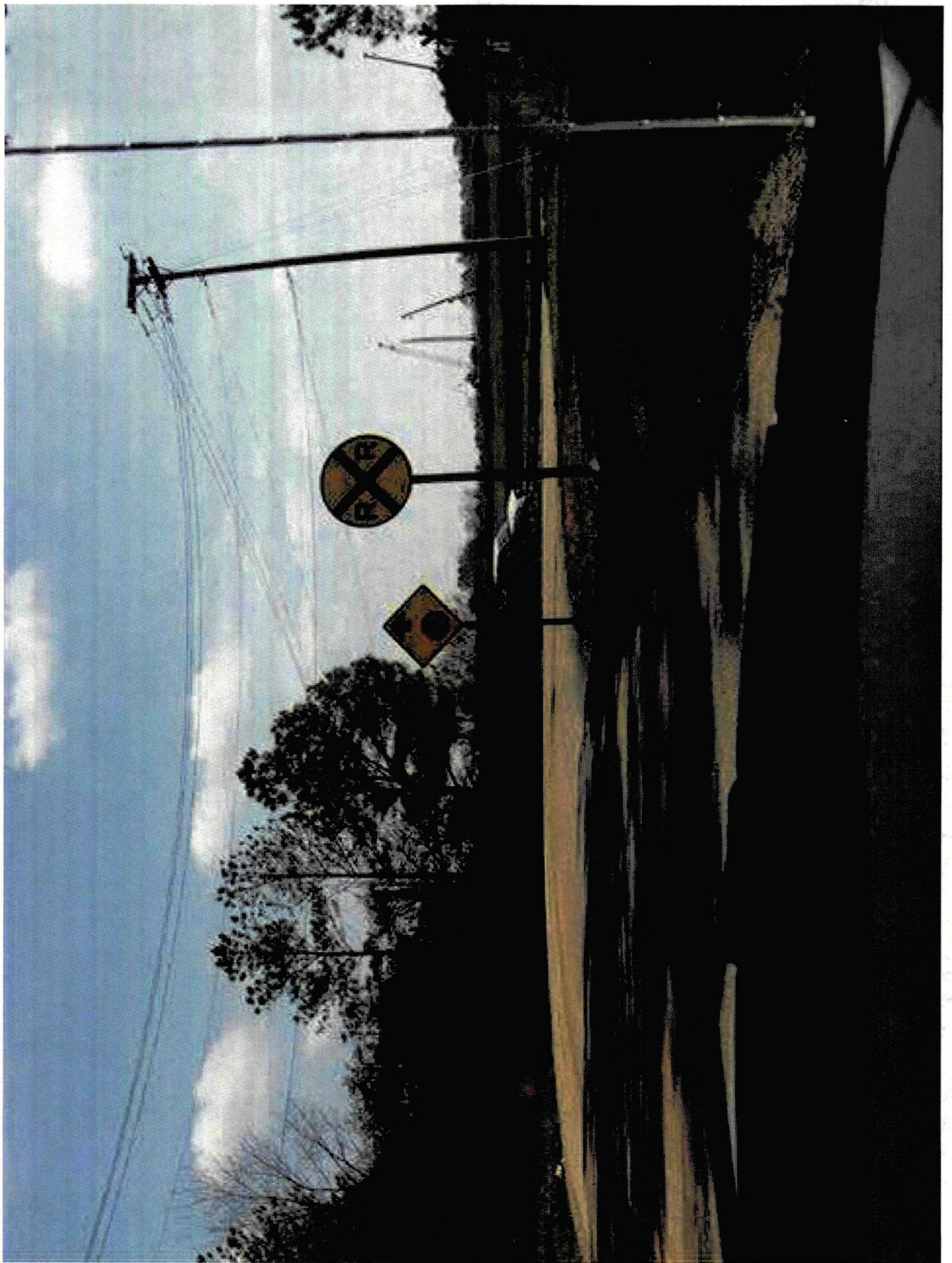
















# EXHIBIT 3

# HILL ROAD SANITARY SEWER EXTENSION

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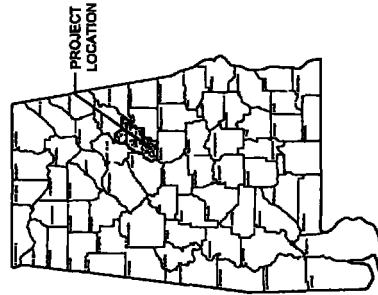
SYLACAUGA UTILITIES BOARD

PREPARED BY:

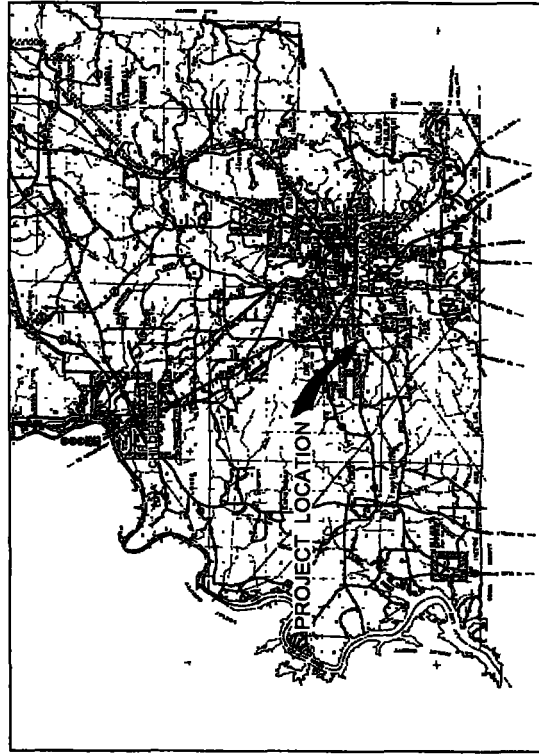


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**COUNTY LOCATION**  
SCALE NONE



**LOCATION MAP**  
SCALE NONE

## DRAWING INDEX

| DRAWING No. | SHEET No. | DESCRIPTION                                |
|-------------|-----------|--|
| GN-1        | 1         | COVER SHEET, SITE LOCATION, AND DRAW INDEX |
| GN-2        | 2         | STANDARD SPECIFICATIONS AND LEGEND         |
| GN-3        | 3         | GENERAL NOTES                              |
| GN-4        | 4         | PLAN AND PROFILE LINE No. GN-1             |
| GN-5        | 5         | PLAN AND PROFILE LINE No. GN-1             |
| DT-1        | 6         | SECTION CONTROL DETAILS                    |
| DT-2        | 7         | TYPICAL MANHOLE DETAILS                    |
| DT-3        | 8         | MISCELLANEOUS DETAILS                      |



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ONE (1) FOR  
RESIDENTIAL  
COMMERCIAL  
CONSTRUCTION  
RESIDENTIAL

CONSTRUCTION PLANS FOR  
HILL ROAD SANITARY  
SEWER EXTENSION  
SYLACAUGA, ALABAMA



PROJECT INFO  
SHEET JOB NO. 100620  
PLATTED 7/24/11



THIS SHEET CONTAINS  
COVER SHEET AND  
SITE LOCATION

SCALE NONE  
SHEET 1 OF 1  
**GN-1**



**EROSION CONTROL NOTES**

1. ALL EROSION CONTROL MEASURES FOR THE DEVELOPMENT OF THESE PLANS SHALL BE OBTAINED BY THE CONTRACTOR PRIOR TO ANY GROUND DISTURBANCE.
2. EROSION CONTROL MEASURES ARE TO BE INSTALLED PRIOR TO BEGINNING ANY OTHER CONSTRUCTION ON THE JOB SITE.
3. THE CONTRACTOR IS RESPONSIBLE FOR INSTALLING, MAINTAINING, AND REMOVING ALL EROSION AND SEDIMENT CONTROL MEASURES THROUGHOUT THE CONSTRUCTION PERIOD. EROSION CONTROL MEASURES ON REQUIRED BY LOCAL, STATE, AND/OR FEDERAL REGULATORY AUTHORITIES.
4. THE EROSION AND SEDIMENT CONTROL MEASURES SHOWN ON THESE DRAWINGS ARE CONSIDERED THE MINIMUM ACCEPTABLE AND SHALL BE MODIFIED IN THE FIELD AS NECESSARY TO COMPLY WITH LOCAL, STATE, AND/OR FEDERAL REQUIREMENTS.
5. EROSION CONTROL MEASURES MUST BE MAINTAINED UNTIL PERMANENT GROUND COVER IS ESTABLISHED AND THE SLOPE FULFILL IS TERMINATED.
6. ALL DISTURBED AREAS NOT SHOWN TO BE LANDSCAPED SHALL BE RESEED & MULCHED AS PER LOCAL STANDARDS AND SPECIFICATIONS.
7. CONTRACTOR SHALL COMPLY WITH ALL LOCAL, STATE, AND FEDERAL REGULATIONS RELATING TO THE DISCHARGE OF FUEL, OIL, AND GREASE. AN SPILL PLAN MUST BE MAINTAINED AND IMPLEMENTED ON SITE.
8. STREAMS SHALL NOT BE USED AS TRANSPORTATION ROUTES FOR HEAVY EQUIPMENT. CHANNELS SHALL BE LIMITED TO ONE POINT AND SHALL BE MAINTAINED TO PREVENT OBSTRUCTION OF FLOW. EROSION BANKS AND CHANNELS SHOULD BE MAINTAINED.

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**EROSION CONTROL PLAN AND PERFORMANCE STANDARDS**

1. THE EROSION CONTROL PLAN SHALL CONTAIN A DESCRIPTION OF THE EXISTING SITE CONDITIONS, A DESCRIPTION OF ADAPTED TOPOGRAPHICAL FEATURES, INFORMATION NECESSARY TO DETERMINE THE EROSION RISK OF THE SITE, THE POTENTIAL PROBLEMS ASSOCIATED WITH THE PROPOSED DEVELOPMENT, AND THE SPECIFICATIONS, EROSION WATER MANAGEMENT CONSIDERATIONS, PROPOSED THIS SCHEDULE FOR IMPLEMENTATION AND COMPLETION OF EROSION CONTROL MEASURES, AND THE LOCATION OF ALL EROSION CONTROL MEASURES. THE PLAN SHALL INCLUDE THE RESULTS OF ALL INFORMATION NEEDED TO DETERMINE THE EROSION RISK OF THE SITE. THE EROSION CONTROL PLAN SHALL INCLUDE THE RESULTS OF ALL INFORMATION NEEDED BY, AND SUBJECT TO THE APPROVAL OF, THE SPECIAL PERMIT TO THE BENEFIT OF THE PERMIT.
2. EROSION CONTROL MEASURES SHALL BE MAINTAINED AS AN EFFECTIVE BARRIER TO SEDIMENTATION AND EROSION IN ACCORDANCE WITH THE PLAN.
3. THERE SHALL BE NO DIRECTLY VISIBLE FLOWING SOIL OR OTHER MATERIAL CONTAINED IN THE STORM WATER DISCHARGE. THE EROSION CONTROL MEASURES SHALL BE MAINTAINED TO PREVENT THE PURPOSE OF ENVIRONMENTAL STUDIES AND WHICH DO NOT HAVE A HARMFUL EFFECT ON THE DEGREE OF WATER WITHIN THE OAK OR OTHER WATERSHED. THE EROSION CONTROL MEASURES SHALL BE MAINTAINED TO PREVENT HAZARDOUS OR OTHERWISE DETRIMENTAL TO HUMAN LIFE, LIVELIHOOD, WILDLIFE, PLANT LIFE OR FISH AND AQUATIC LIFE IN THE COMMUNITY WATERSHED.

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**EROSION CONTROL SEQUENCE**

1. ALL CONSTRUCTION SHALL BE DONE IN A LOGICAL SEQUENCE SO TO MINIMIZE THE AREA OF DISTURBANCE.
2. OBTAIN REQUIRED PERMITS.
3. STAKE PROPERTY LINES AND CLEARING LIMITS.
4. SELECTIVELY CLEAR WITHIN AS REQUIRED TO INSTALL SLOPE PROTECTION AND PERIMETER EROSION CONTROL MEASURES.
5. INSTALL SLOPE PROTECTION ALONG SLOPE BOUNDARIES.
6. PROTECT STORM SEWER WITHIN DOWNSTREAM OF CONSTRUCTION WITH ANY SLOPE, WATERSHED, OR FENCE AND/OR OTHER PROTECTIVE MEASURES.
7. INSTALL OTHER REQUIRED EROSION CONTROL MEASURES DOWNSTREAM OF PROJECT AREA.
8. PERFORM CLEARING AND GRUBBING.
9. INSTALL SLOPE PROTECTION STOCKPILES.
10. BEGIN EXCAVATION AND CONSTRUCT PROJECT.
11. MAINTAIN AND MAINTAIN EROSION CONTROL AS REQUIRED DURING CONSTRUCTION.
12. RESPECT ALL EROSION CONTROL MEASURES AFTER EVERY DAY. MAINTAIN COPIES OF ALL EROSION CONTROL MEASURES SHALL BE SUBMITTED TO THE PROJECT AUTHORITIES IN ACCORDANCE WITH APPLICABLE PERMITS.
13. TEMPORARILY OR PERMANENTLY STABILIZE EXPOSED AREAS AND STOCKPILES LEFT INACTIVE FOR 14 OR MORE CALENDAR DAYS.
14. REMOVE ANY SEDIMENT REACHING PUBLIC OR PRIVATE ROADSWAYS BY STREET CLEANING BEFORE THE END OF EACH DAY. FLUSHING OF STREETS WILL NOT BE ALLOWED.
15. INSTALL TEMPORARY SEDIMENTATION PONDS OR DIVERSION BARRIERS AS REQUIRED TO CONTROL THE FLOW OF WATER AND COLLECTION OF SEDIMENT DURING THE PROJECT.
16. COMPLETE FINE GRADING AND INSTALL PERMANENT SEEDING AND PLANTING.
17. COMPLETE FINAL PAVING FOR ROADS.
18. REMOVE SLOPE PLACES UPON COMPLETION OF ALL CONSTRUCTION ACTIVITY.
19. RESEED AND STABILIZE ANY BARE SPOTS OR WATERSHEDS.
20. TERMINATE ALL PERMITS.

03

**GENERAL NOTES**

1. UNDERGROUND UTILITY LOCATIONS SHOWN ARE FROM UTILITY COMPANY RECORDS OR FROM LINE LOCATION MAPS AND ARE SHOWN IN APPROXIMATE LOCATION ONLY. CONTRACTOR SHALL VERIFY THE LOCATION OF ALL UTILITIES PRIOR TO ANY CONSTRUCTION. CONTRACTOR IS RESPONSIBLE FOR ANY DAMAGE TO EXISTING UTILITIES AS A RESULT OF HIS CONSTRUCTION OPERATIONS.
2. CONTRACTOR IS SOLELY RESPONSIBLE FOR CONSTRUCTION METHODS, SEQUENCES, PROCEDURES, AND JOB SITE SAFETY. THE CONTRACTOR SHALL MAINTAIN ACCESS TO ALL EXISTING UTILITIES AND THE SAFETY OF ALL CONSTRUCTION PERSONNEL AND EXISTING AT ALL STAGES. EROSION DAMAGES NO LIABILITY FOR SAFETY ON THE JOB SITE.
3. ALL UTILITIES WITHIN ROADWAY SHALL BE EXCAVATED COMPLETELY WITH STONE LINERS OTHERWISE DIRECTED BY THE ENGINEERING FIRM OR THE CONSTRUCTION AUTHORITY.
4. ALL AREAS WHICH SHALL BE UNDER NEW STRUCTURES, PAVING, CONCRETE, OR WATERSHED SHALL BE COMPACTED TO 100% STANDARD PROCTOR DENSITY.
5. ALL PERMITS, OTHER THAN THOSE LISTED IN THE SPECIFICATIONS, FOR THE PROJECT OF THESE PLANS ARE THE CONTRACTOR'S RESPONSIBILITY. THE CONTRACTOR SHALL OBTAIN ALL NECESSARY PERMITS PRIOR TO BEGINNING ANY CONSTRUCTION.
6. CONTRACTOR SHALL BE RESPONSIBLE FOR DESIGNING AND CONSTRUCTION OF ALL UTILITIES AND DESIGN NOT ACCEPTABLE TO THE OWNER.
7. CONTRACTOR SHALL COORDINATE ALL WORK WITH ALL OTHER CONCURRENT WORK AND PERFORMED IN THE AREA.
8. THE CONTRACTOR SHALL RESTORE ALL EXISTING FENCES, TREES, AND OTHER STREET HANDICAPS, MAIL BOXES, WATER LINES, GAS LINES, OIL AND WATER METER BOXES (INCLUDING INLET/OUTLET), PROPERTY CORNER MARKERS, AND OTHERS DAMAGED BY CONSTRUCTION OPERATIONS TO THEIR ORIGINAL CONDITION.
9. IN EXISTING CONSTRUCTION SHALL PROTECT AND RESTORE ROAD PROPERTY TO ORIGINAL CONDITION. CONTRACTOR SHALL MAINTAIN THE BARRIERS OF CONSTRUCTION.
10. FENCES AND BARRIERS SHALL BE RECONSTRUCTED AS PART OF THE PROJECT. THE CONTRACTOR SHALL ALSO BE RESPONSIBLE FOR THE TEMPORARY REPAIR AND MAINTENANCE OF STREETS AND DRIVEWAYS UNTIL THE PROJECT IS SUBSTANTIALLY COMPLETE. THIS ALSO INCLUDES THE FILLING OF UTILITY AND WATERSHEDS INCLUDING UNPAVED TUNNEL CONSTRUCTION.
11. CONTRACTOR SHALL CLOSELY COORDINATE ALL CONSTRUCTION WITH OWNER OR DESIGNATED REPRESENTATIVE.
12. CONTRACTOR SHALL NOTIFY OWNER AT LEAST 24 HOURS IN ADVANCE PRIOR TO STARTING WORK WHICH WILL PLACE OBSTRUCTIONS OUT OF WATER SERVICE.
13. ALL MATERIALS REMOVED OR REPLACED SHALL BE RETURNED TO THE OWNER (E.G. VALVES, VALVE BOXES, ETC.).
14. CONTRACTOR SHALL NOTIFY OWNER PRIOR TO INITIATING CONSTRUCTION ON THE WATER SYSTEM AND SHALL BE RESPONSIBLE FOR OBTAINING PERMITS AND AHEAD FROM REMOVAL OF WATER SYSTEM DURING CONSTRUCTION.
15. ALL EXISTING UTILITIES ARE TO REMAIN IN SERVICE WHILE THE PROPOSED LINE IS BEING Laid AND PLACED INTO SERVICE.

01





INSITE ENGINEERS  
1000 N. ALABAMA AVE.  
SUITE 200  
BIRMINGHAM, AL 35203  
TEL: 205-261-1111  
FAX: 205-261-1112  
WWW.INSITE-ENGINEERS.COM

CONSTRUCTION PLANS FOR  
HILL ROAD SANITARY  
SEWER EXTENSION  
SYLACAUGA UTILITIES BOARD

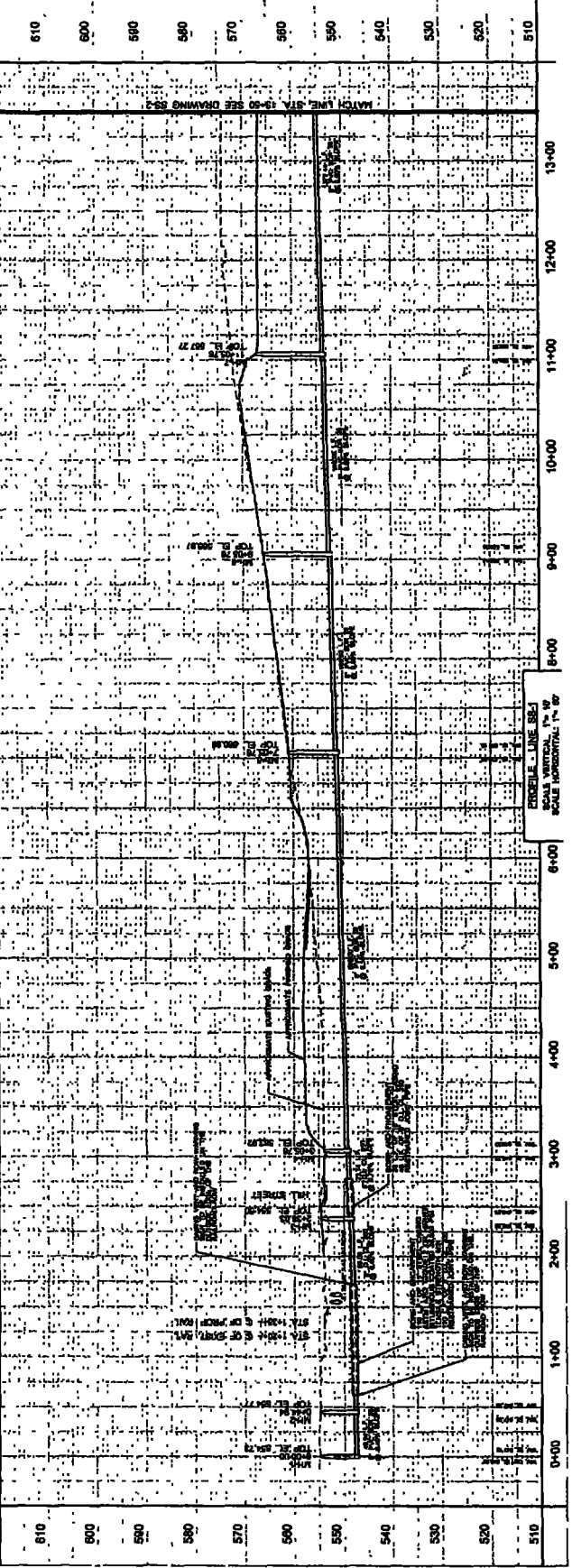
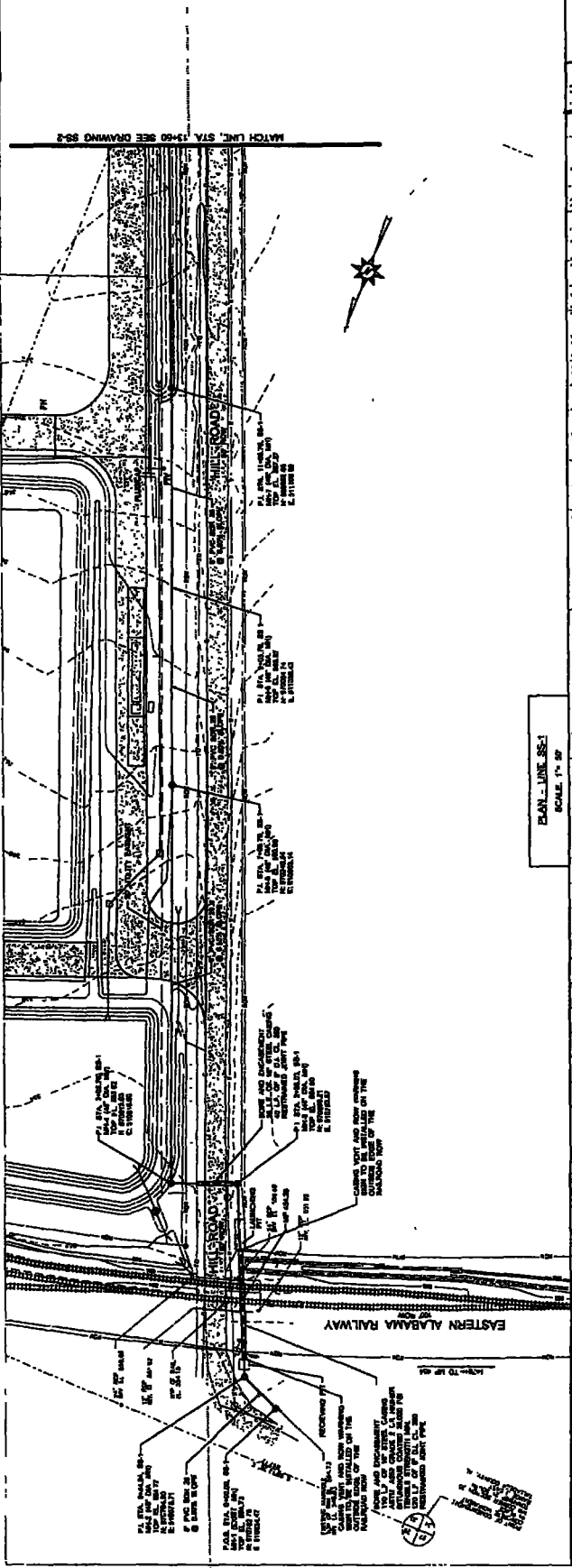


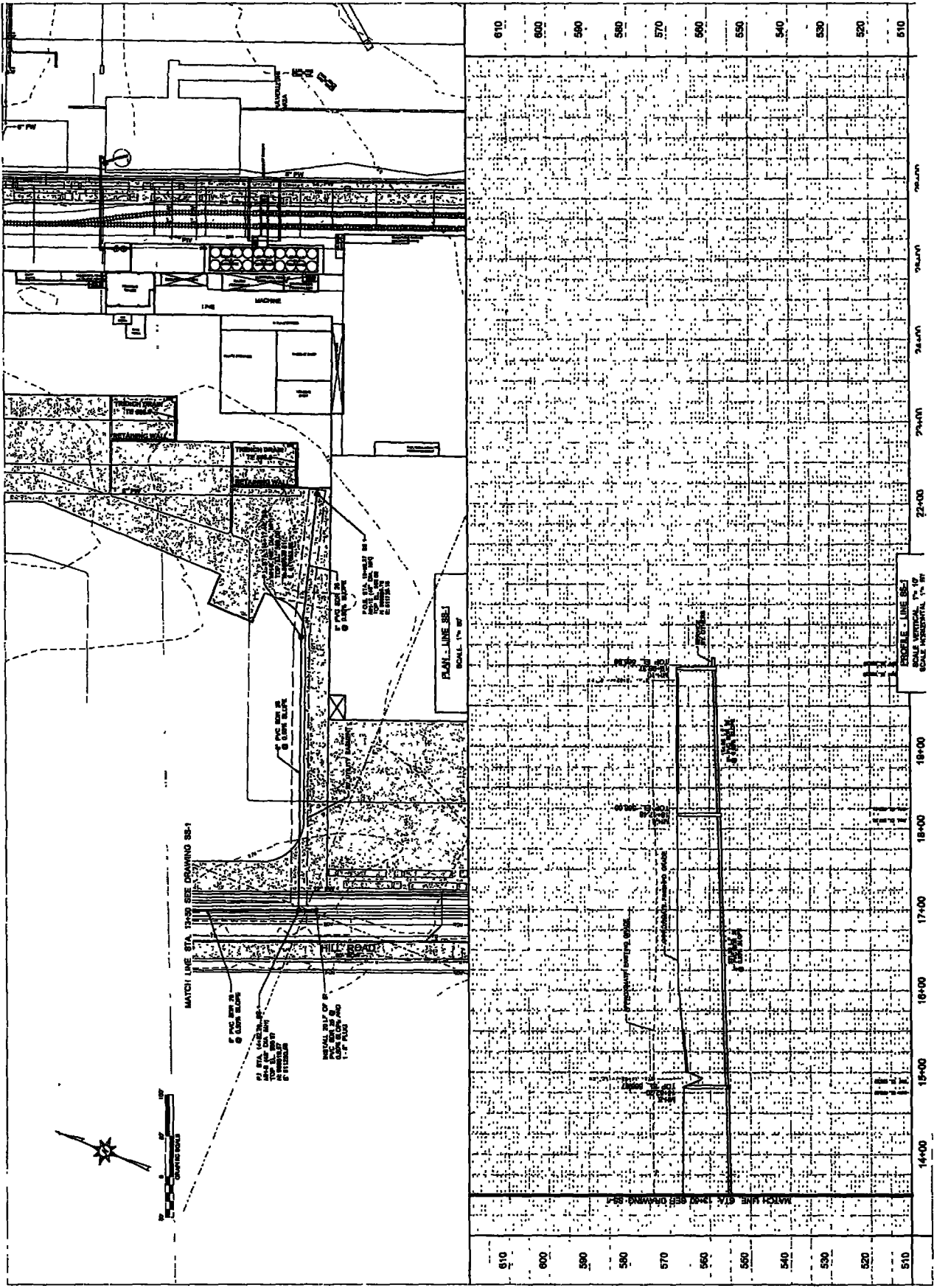
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HILL ROAD SANITARY  
SEWER EXTENSION  
DRAWING TITLE



THIS SHEET CONTAINS  
PLAN AND  
LINE NO. SS-1  
SCALE AS NOTED  
SHEET 2 OF 3

SS-1











**INSITE ENGINEERING**  
 1005 KILGORE HWY  
 HOUSTON, ALABAMA 35894  
 (205) 948-1234  
 FAX: (205) 948-1235  
 insite@insite-engineering.com

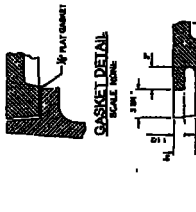
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**CONSTRUCTION PLANS FOR:**  
**HILL ROAD SANITARY SEWER EXTENSION**  
 SYLACAUGA UTILITIES BOARD  
 SYLACAUGA, ALABAMA




**PROJECT INFO**  
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 SHEET: 7 OF 11  
 SCALE: AS NOTED  
 SHEET: 7 OF 11  
 DT-2

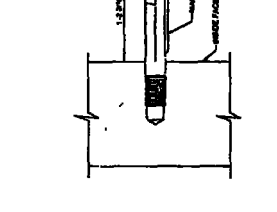
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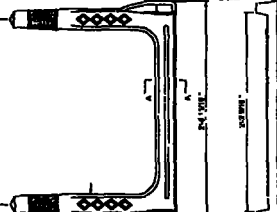
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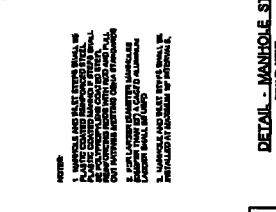
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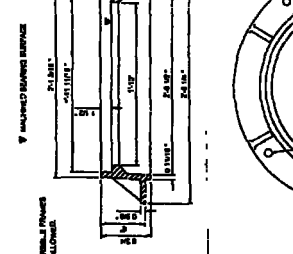
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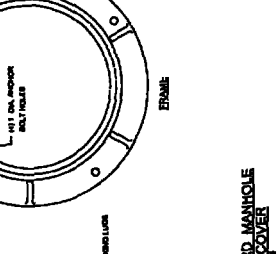
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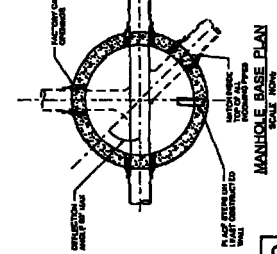
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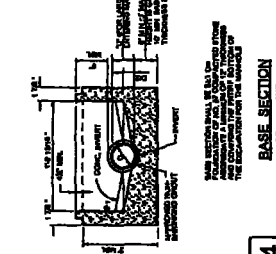
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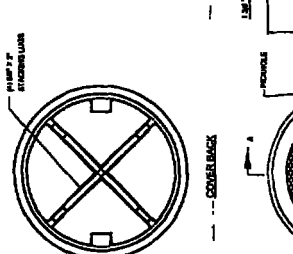
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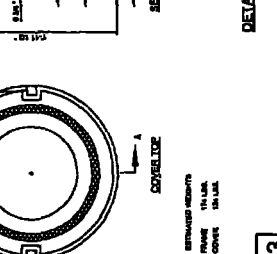
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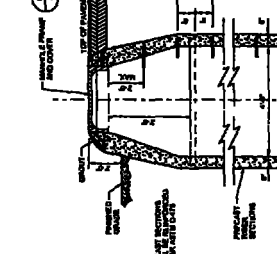
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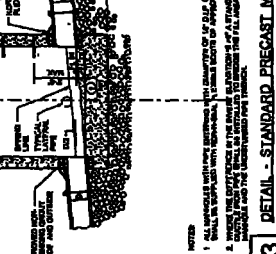
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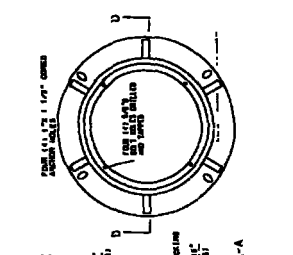
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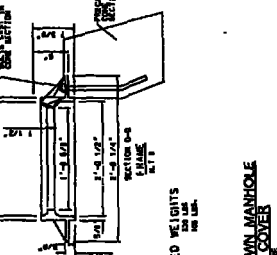
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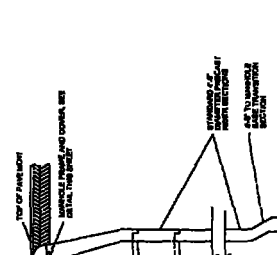
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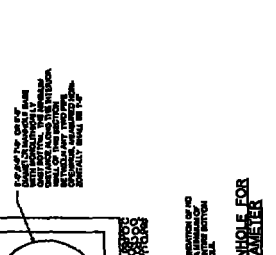
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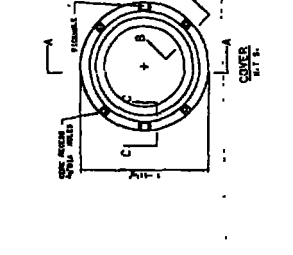
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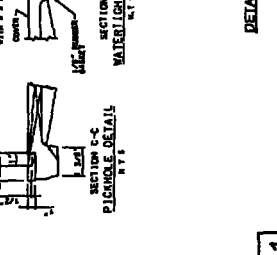
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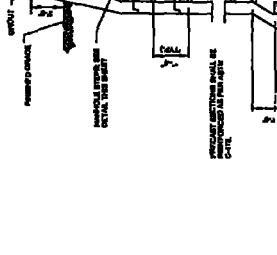
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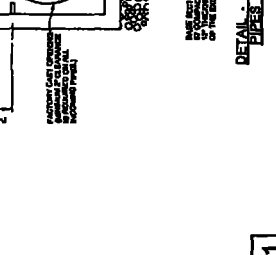
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**DETAIL - PRECAST MANHOLE FOR PIPES 24" TO 42" DIAMETER**  
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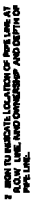


**DETAIL - PRECAST MANHOLE FOR PIPES 24" TO 42" DIAMETER**  
 SCALE: NONE





DT-3



## 03



# EXHIBIT 4



**RA**

**You should rely only on the information contained in this prospectus or in any free writing prospectus we may authorize to be delivered to you. We have not, and the Initial Stockholder and underwriters have not, authorized anyone to provide you with different information. If anyone provides you with different information, you should not rely on it. We are not, and the Initial Stockholder and underwriters are not, making an offer of these securities in any jurisdiction where the offer is not permitted. You should not assume that the information contained in this prospectus is accurate as of any date other than the date on the front of this prospectus.**

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Until November 6, 2009 (25 days after the date of this prospectus), all dealers that buy, sell or trade our common stock, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to each dealer's obligation to deliver a prospectus when acting as underwriter and with respect to its unsold allotments or subscriptions.

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### **PROSPECTUS SUMMARY**

*This summary highlights information contained elsewhere in this prospectus. You should read the entire prospectus carefully, including the section entitled "Risk Factors" and our financial statements and the related notes included elsewhere in this prospectus, before making an investment decision to purchase shares of our common stock. Unless the context suggests otherwise, references in this prospectus to "RailAmerica," the "Company," "we," "us," and "our" refer to RailAmerica, Inc. and its subsidiaries. References in this prospectus to "Fortress" refer to Fortress Investment Group LLC. All amounts in this prospectus are expressed in U.S. dollars and the financial statements have been prepared in accordance with generally accepted accounting principles in the United States ("GAAP"). Unless the context suggests otherwise, all share and per share information in this prospectus gives effect to the 90-for-1 stock split of our common stock, which occurred on September 22, 2009.*

#### **Our Company**

We believe that we are the largest owner and operator of short line and regional freight railroads in North America, measured in terms of total track-miles, operating a portfolio of 40 individual railroads with approximately 7,500 miles of track in 27 U.S. states and three Canadian provinces. Our railroad portfolio represents an important component of North America's transportation infrastructure, carrying large quantities of freight for a highly diverse customer base. In 2008, our railroads transported over one million carloads of freight for approximately 1,800 customers, hauling a wide range of products such as farm and food products, lumber and forest products, paper and paper products, metals, chemicals and coal.

For the majority of our customers, our railroads transport freight between a customer's facility or plant and a connection point with a Class I railroad (a railroad with over \$359.6 million in revenues in 2007). Each of our railroads connects with at least one Class I railroad, and in many cases connects with multiple Class I railroads. Frequently, our railroads are the only rail lines directly serving our customers. Moreover, due to the nature of the freight we carry — heavy, large quantities shipped long distances — our service is often the most cost competitive mode of transportation for shippers. In addition to providing freight services, we also generate non-freight revenue from other sources such as railcar storage, demurrage (allowing our customers and other railroads to use our railcars for storage or transportation in exchange for a daily fee), leases of equipment to other users, and real estate leases and use fees.

Typically, we provide our freight services under a contract or similar arrangement with either the customer located on our rail line or the connecting Class I railroad. Because we normally provide transportation for only a segment of a shipment's total distance, with the Class I railroad carrying the freight the majority of the distance, customers are usually billed once, typically by the Class I railroad, for the total cost of rail transport. The Class I railroad is obligated to pay us in a timely manner upon delivery of our portion of the rail service regardless of whether or when the Class I railroad actually receives the total payment from the customer, which reduces our collections risk due to the high credit quality of North American Class I railroads.

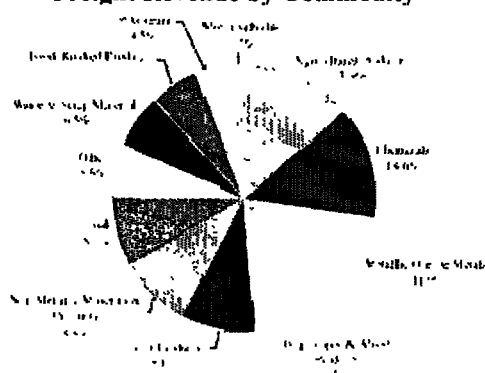
Railroads represent the largest component of North America's freight transportation industry, carrying more freight than any other mode of transportation on a ton-mile basis. According to the Association of American Railroads, or AAR, in 2006 (the most recent year for which data is available) railroads carried 43% of the total ton-miles (one ton of freight shipped one mile) of freight transported in the U.S. alone. Short line and regional railroads in particular are a vital part of North America's overall railroad network, connecting customer facilities to Class I railroads and providing an essential service to major shippers and receivers of freight. As one of the largest owners and operators of short line and regional freight railroads in North America, we believe that we are well positioned to take advantage of the rail industry's favorable dynamics and to continue to grow our business both internally, by growing revenue and earnings from our existing portfolio of railroads, and as an active acquirer in the industry.

We generated total operating revenue of \$508.5 million and net income of \$16.5 million for the year ended December 31, 2008 and total operating revenue of \$206.5 million and net income of \$19.2 million for the six months ended June 30, 2009.

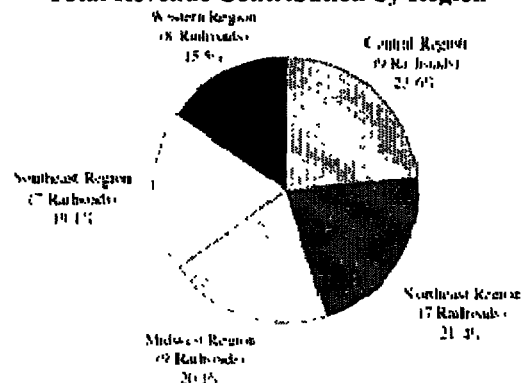
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The following charts show the relative percentages of our freight revenue by commodity and our total revenue contribution by region for the year ended December 31, 2008.

**Freight Revenue by Commodity**



**Total Revenue Contribution by Region**



## Competitive Strengths

We believe that the key competitive strengths that will enable us to execute our strategy include:

- **Profitable operations with substantial earnings growth:** Our focus on continuously improving the operating efficiency and profitability of each of our 40 railroads has allowed us to significantly increase our operating margins and grow our cash flow. As a result of our management team's focus on improving operating efficiency, our operating ratio, defined as total operating expenses divided by total operating revenue, improved from 89% for the year ended December 31, 2006 to 86% for the year ended December 31, 2007 to 83% for the year ended December 31, 2008. Our operating ratio improved from 84% for the six months ended June 30, 2008 to 78% for the six months ended June 30, 2009. Additionally, due to the relative operational simplicity of our railroads, we have more predictable and lower capital expenditures when compared to the more complex requirements of many Class I networks. As a result of our focus on improving operating efficiency and our predictable capital expenditures, we expect to continue to be able to grow our earnings and cash flow over the long term.
- **Favorable tax attributes:** We also benefit from favorable tax attributes which substantially reduce our income tax obligations. As of December 31, 2008, we had \$120 million of federal net operating loss carry-forwards expiring between 2020 and 2027 and \$95 million of short line tax credits available through 2028. We believe short line railroads will continue to benefit from strong legislative and shipper support due to the pro-competitive nature of our business.
- 1 • **Diversified portfolio of freight railroads:** We benefit from significant diversity in our customer base, product base, geographic footprint and our relationships with Class I railroads. For the year ended December 31, 2008, no single customer accounted for more than 5% of our freight revenue and our top ten customers accounted for approximately 20% of our freight revenue. In addition, the types of freight hauled over our railroads include more than a dozen commodities, none of which accounted for more than 14% of our freight revenue for the year ended December 31, 2008. This diversity reduces the impact from a downturn in the volume of any single product or a particular regional economy and lowers our dependence on any one customer.
- **Stable and predictable revenue base:** Our railroads are often integrated into a customer's facility and serve as an important component of that customer's distribution or input network. In many circumstances, our customers have made significant capital investments in facilities on or near our railroads (as in the case of electric utilities, industrial plants or major warehouses) or are geographically unable to relocate (as in the case of coal mines and rock quarries). This provides us with a stable and predictable revenue base.



## **Table of Contents**

- *Focus on safety:* Our focus on safety allows us to improve the quality and reliability of our services, prevent accidents and injuries, and lower the costs and risks associated with operating our business. As a result of this safety focus, from 2004 to 2008 we have reduced our Reportable Injuries Ratio, defined by the Federal Railroad Administration, or FRA, as reportable personal injuries per 200,000 man-hours, from 2.84x to 1.64x. Similarly, from 2004 to 2008 we reduced our Reportable Train Accidents Ratio, defined by the FRA as reportable train accidents per 100,000 train miles, from 1.08x to 0.74x.
- *Highly experienced management:* Our senior management team, which was appointed in early 2007, is comprised of experienced rail industry executives with an average of 26 years in the industry and a track record of generating financial improvements both at well established operations, as well as at newly acquired and underperforming railroads. Several members of management have held senior positions at both Class I railroads as well as other short line and regional railroads. We believe that the experience of our senior management team and its focus on revenue, cash flow and earnings growth are significant contributors to improving the operating and financial performance of our railroads.

### **Growth Strategy**

We plan to grow our revenue, cash flow and earnings by employing the following growth strategies:

*Growing freight revenue:* We are focused on growing our freight revenue by seeking new business opportunities at our individual railroads and by centralizing key commercial and pricing decisions. We believe that shippers often seek to locate their operations on short lines because of possible access to multiple Class I railroads and the resulting negotiating leverage it affords them. To this end, our commercial and development team actively solicits customers to locate their manufacturing and warehousing facilities on our railroads. We also seek to generate new business by converting customers located on or near our railroads from other modes of transportation to rail. Members of our senior management team have significant prior experience in the marketing departments of both Class I and short line railroads. Additionally, by centralizing and carefully analyzing pricing decisions based on prevailing market conditions and competitive analysis rather than having such decisions made at the railroad level by local management, we believe we can leverage our management team's expertise and increase rates per carload.

*Expanding our non-freight services and revenue:* We intend to continue to expand and grow the non-freight services we offer to both our rail customers and other parties. Non-freight services offered to our rail customers include switching (or unloading and positioning railcars within a customer's facility), storing customers' excess or idle railcars on inactive portions of our rail lines, third party railcar repair, and car hire and demurrage. Each of these services leverages our existing customer relationships and generates additional revenue at a high margin with minimal capital investment. We also seek to grow our revenue from non-transportation uses of our land holdings such as land leases, crossing or access rights, subsurface rights, signboards and cellular communication towers, among others. These sources of revenue and value are an important area of focus by our management as such revenue has minimal associated operating costs or capital expenditures and represents a recurring, high margin cash flow stream. As a result of this strategy, we have grown our non-freight revenue from \$56.2 million, or 12.2% of operating revenue, in 2006 to \$68.4 million, or 13.5% of operating revenue, in 2008.

*Pursuing opportunistic acquisitions:* The North American short line and regional railroad industry is highly fragmented, with approximately 550 short line and regional railroads operating approximately 45,800 miles of track. We believe that opportunistically acquiring additional short line and regional railroads will enable us to grow our revenue and achieve a number of further benefits including, among others, expanding and enhancing our services, further diversifying our portfolio and achieving economies of scale by leveraging senior management experience and corporate costs over a broader revenue base. We believe that the opportunity to acquire assets at attractive valuations is increasing due to the tighter credit environment combined with lower volumes, which results in more willing sellers of assets and a limited number of buyers that possess both the financial flexibility and the expertise to capitalize on these opportunities.

# EXHIBIT 5

Revised Permit 11-14-11

To be completed by Real Estate Manager

Contract Number

RR Code

Lessee Code

Engineer Approval

Date Approved



## RailAmerica

Real Estate Department, 7411 Fullerton Street - Suite 110, Jacksonville, FL 32256

### APPLICATION FOR UNDERGROUND PIPELINE CROSSING OR PARALLELISM OF RAILROAD PROPERTY AND OR TRACK

*Incomplete or Inaccurate Information will delay application request*

#### Section 1 - Applicant Data

##### Facility Owner

Complete Name of Applicant to  
appear on Legal Document:

Sylacauga Utilities Board

Applicant Mailing Address:

P.O. Box 207

Sylacauga, AL 35150

Applicant overnight Address:

1414 Edwards Street

Sylacauga, AL 35150

Applicant Billing Address:

P.O. Box 207

Sylacauga, AL 35150

Applicant FEIN or  
Social Security  
Number:

Applicant  
Contact Name  
& Title:

Mike McGinnis (Water & Sewer Foreman)

Telephone  
Number:

(256) 249-0372

Fax Number: (256) 461-2528

Email Address:

mmcginnis@sylacauga.net

Emergency Contact:

Mike McGinnis

Emergency Telephone Number:

(256) 510-6535

Applicant:

☐ Corporation

☐ Partnership

☐ Sole Proprietor

☐ Individual

☒ Municipality

☐ Developer

☐ Other

If other please explain

State of Incorporation or  
Partnership:

Alabama

**Contact during Application  
Process:**

Name: Mike McGinnis  
Telephone Number: (256) 249-0372 Fax Number: (256) 401-2528  
Email Address: mmcginnis@sybaranga.net

**Section 2 - Location Data**

Proposed date of Installation 12-1-11 to 5-1-12  
Railroad Name: RailAmerica  
Nearest City: Sylaranga County: Talladega State: Alabama  
If Crossing Nearest Railroad Mile Post (required): 1478 ± Feet from Railroad Milepost 454 N S(E)W  
Latitude/Longitude: N 33° 10' 02.99" W 86° 18' 30.89"  
Valuation Station: MP 454.28  
Quarter, Section, Township & Range: Township 21 South, Range 3 East, Section 35

Railroad Subdivision (required) Hill Road US DOT/AAR Crossing Number: \_\_\_\_\_  
Is Crossing within a Public Road Right-of-Way? ☒ Yes\* ☐ No If YES, Name of Street: Hill Road (60' ROW)

\*If yes, road name, number and width of public right-of-way are required on drawing, incomplete information will delay the application process.

**Section 3 - Pipeline Data**

Crossing or Parallelism? ☒ Crossing ☐ Parallelism  
If Crossing complete sections 3 and 4  
If Parallelism complete sections 3, 4 and 5  
Installation: ☒ New ☐ Maintenance \* ☐ Upgrade \*\* ☐ Replacement \*\* ☐ Other

\*\*If revision or maintenance to existing crossing provide agreement number (Required): \_\_\_\_\_

Proposed Date of Installation \_\_\_\_\_

If Other or revision to existing facility please explain \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Product to be Conveyed:

☐ Water ☒ Sewer ☐ Oil ☐ Gas ☐ Storm Drain

Type of Service (Choose one)

☐ Transmission ☐ Distribution ☒ Service ☐ Other

Angle of Pipe Line Crossing the Track:

84° 13' 36" Degrees

Will facility be exclusively used by Applicant?

☒ Yes ☐ No\*\*\*

\*\*\*If no, list all entities who will be using this facility:

### Pipeline Specifications

|  | Carrier Pipe     | Casing Pipe    |
|--|------------------|----------------|
| Material                                 | D.I.             | Steel          |
| Material Specifications and Grade        | CL 350           | ASTM A252 GR 2 |
| Minimum Yield Strength of material (PSI) |                  | 35,000         |
| Mill Test Pressure                       | 1163             |                |
| Inside Diameter                          | 8.55"            | 15.25"         |
| Outside Diameter                         | 9.05"            | 16"            |
| Wall Thickness                           | .25"             | .375"          |
| Type of Seam                             | Push on          | welded         |
| Laying Lengths                           | 20 LF            | 40 LF          |
| Type of Joints                           | Restrained Joint | welded         |

Vents. yes Number: 2 Size 2"

Seals. Both Ends ☒ Yes ☐ No One End: ☐ Yes ☒ No

\*\*Cathode Protection:

☐ Yes ☒ No

\*\*Protective Coating

☒ Yes ☐ No

\*\* Kind

Bituminous Coating

Type, size, and spacing of insulators or supports

EPDM, 8" x 16", @ 8' O.C.

Location of Shut-Off Valves.

N/A

Number of Manholes:

0

Describe in detail the manner and method of installation on Railroad Property:

At milepost 454.28  
a 16" steel casing will be bored and jacked crossing RailAmerica  
ROW. The ROW width at this location is 100'. The casing will  
extend 5' outside the ROW. A new 8" D.I. Restrained  
joint pipe will be installed in this casing to collect  
sanitary sewer.

Number of Tracks

Crossed

2

Total Buried Length on Railroad  
Right of Way:

100'

Bury: Bottom of  
Tie to Top of  
Casing:

Feet and Inches:

5'-6"

Location of Boring Pits adjacent to Track:

50+

feet

Right & Left

Launching Pit:

30'

feet

Receiving Pit

10'

feet

#### Section 5 - Parallelism Data

Total Buried Length on Railroad  
Right of Way:

Location if Parallelism Crosses  
Tracks:

Begin Parallelism

Railroad Milepost:

Feet from Railroad Milepost

N S E W

End of Parallelism

Railroad Milepost:

Feet from Railroad Milepost

N S E W

Describe in Detail the manner and method of installation on Railroad Property:

**Plans for proposed installation shall be submitted to and approved by the Railroad and designated engineer before work can begin!**

Upon application approval, applicant agrees to reimburse Railroad for any cost incurred by Railroad incident to the installation, maintenance and/or supervision necessitated by the installation. Applicant further agrees to assume all liability for accidents or injuries that arise as a result of this installation.

Material and installation are to be in strict accordance with specifications of National Electrical Safety Code and AREMA, current edition, and requirements of the Railroad.

Prior to submission, it is recommended that any questions concerning this application should be submitted to the Real Estate Department of RailAmerica, Inc. All questions or requests for information submitted by email receive a rapid response. Other requests can be made by phone (904) 538-6365, or fax (904) 256-1428. Additional information can also be obtained at our website: [www.railamerica.com](http://www.railamerica.com).

Standard Application processing takes approximately 4-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.

Mail the application for proposed facility in triplicate, along with a \$1,000 Application Fee, \$1,500 Engineering Review Fee, and a \$1,500 Contractors Access/Occupancy Application Fee (all fees are non-refundable) in U.S. Funds to:

RailAmerica, Inc.  
Attn: Real Estate Department  
7411 Fullerton Street - Suite 110  
Jacksonville, FL 32256

**Make Check payable to the Railroad in question. W-9 Information available upon request.**

This section must be completed in full signed and dated when submitting to the Real Estate Department for processing, incomplete or inaccurate information will delay application request. Unsigned applications will be returned to applicant for signature and submission date.

Date: \_\_\_\_\_ Signature: Mike Richard  
Phone Number: \_\_\_\_\_ Printed Name: Mike Richard  
Fax Number: \_\_\_\_\_ Title: General Manager

Contact Email Address: \_\_\_\_\_

If installing more than one facility in the same location, a separate application **MUST** be completed for each new line to be installed. Applications submitted with more than one facility listed will be returned and will not be processed until all applications are returned accurate, complete and with all applicable fees.

**IMPORTANT!**

In order for the application to be complete ALL details pertinent to the proposed installation must be completed in full and submitted along with the following documents:

|                          | # of Copies | Amount Due     | Description  |
|--------------------------|-------------|----------------|--|
| <input type="checkbox"/> | 2           | \$1,000        | Completed Wire line Application and processing fee   |
| <input type="checkbox"/> | 2           | \$1,500        | Engineer review fee, plans/drawings, no larger than 11 x 17. Larger drawings will incur additional engineering fees. |
| <input type="checkbox"/> | 2           | \$1,500        | Completed Contractor's Access/Occupancy Application and Fee  |
|                          |             | <b>\$4,000</b> |  |

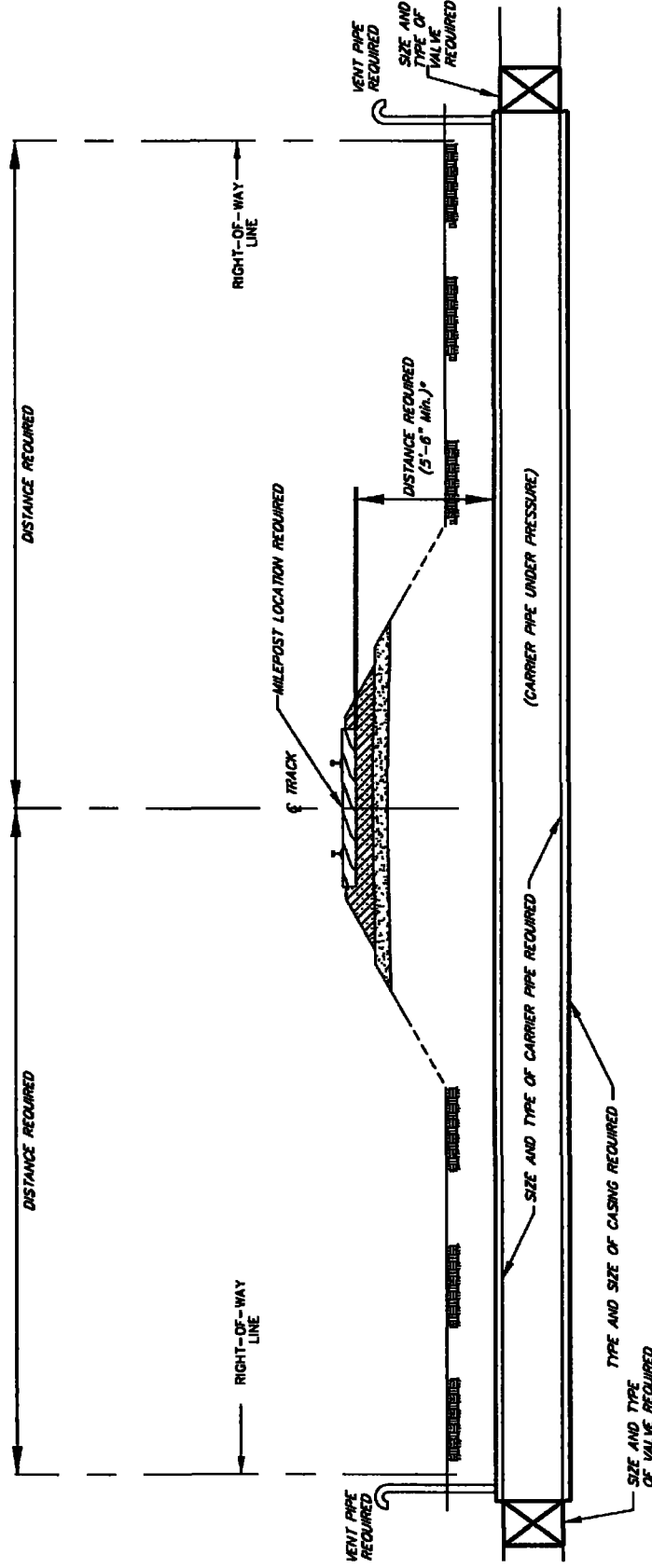
Standard Application processing takes approximately 4-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.

**Entering or working on the railroad right of way or any other railroad property without the permission of the railroad is trespassing and illegal. Violators risk the possibility of serious, even fatal, injury and will be prosecuted.**

# EXHIBIT 6



NAME OF RAILROAD (REQUIRED)



- GENERAL NOTES**
1. PVC WILL NOT BE PERMITTED AS CASING OR CARRIER PIPE ON RAILROAD RIGHT-OF-WAY
  2. CITY, COUNTY, STATE AND RAILROAD MILEPOST LOCATION REQUIRED.
  3. IF HOPE PIPE IS USED, IT MUST BE SCHEDULE 40 AND MAY ONLY BE USED FOR DIRECTIONAL BORE. A DISTANCE OF 10' MEASURED FROM BOTTOM OF THE TO TOP OF PIPE IS REQUIRED.
  4. NO WORK WILL BE PERMITTED ON RAILROAD RIGHT-OF-WAY WITHOUT A FLAGMAN.
  5. 10' FOR UNCAST GAS. (STEEL CARRIER REQUIRED)

|  |   |   |                              |  |                          |
|--|---|---|------------------------------|--|--------------------------|
|  | ISSUE DATE: 08-13-0008<br>AUTHORIZED: <i>James J. Perrine</i><br>REVISED DATE: 08-28-2011<br>APPROVING: <i>James J. Perrine</i> | THE MATERIAL AND EQUIPMENT SHOWN HEREIN MUST MEET OR EXCEED ALL QUALITY REQUIREMENTS. ANY DEVIATION FROM THESE SPECIFICATIONS MUST BE SUBMITTED IN WRITING TO THE ENGINEERING SERVICES DIVISION PRIOR TO USE. | MISCELLANEOUS<br>SERIES 0000 | INFORMATION REQUIRED FOR<br>TYPICAL JACK & BORE<br>(CARRIER PIPE UNDER PRESSURE) | ES8080.6<br>SHEET 1 OF 1 |
|  | TYP DWG   |   |                              |  |                          |

|                   |
|-------------------|
| FILE              |
| ES8080.6          |
| REVISIONS         |
| 08-28-2011 TJP/ML |

# EXHIBIT 7

|   |  |  |  |   |   |  |   |   |   |   |  |
|---|--|--|--|---|---|--|---|---|---|---|--|
| <div> <div>FILE</div> <div>ES8090.5</div> <div>REVISIONS</div> </div> | <div>NAME OF RAILROAD (REQUIRED)</div> |  |  | <div> <div>TYPE AND SIZE OF CASING REQUIRED</div> <div>SIZE AND TYPE OF CARRIER PIPE REQUIRED</div> <div>(CARRIER PIPE NOT UNDER PRESSURE)</div> </div> | <div> <div>GENERAL NOTES</div> <ol style="list-style-type: none"> <li>PVC WILL NOT BE PERMITTED AS CASING OR CARRIER PIPE ON RAILROAD RIGHT-OF-WAY</li> <li>CITY, COUNTY, STATE AND RAILROAD MILEPOST LOCATION REQUIRED</li> <li>IF HOPE PIPE IS USED, IT MUST BE SCHEDULE 40 AND MAY ONLY BE USED FOR DIRECTIONAL BORE. A DISTANCE OF 10' MEASURED FROM BOTTOM OF DE TO TOP OF PIPE IS REQUIRED.</li> <li>NO WORK WILL BE PERMITTED ON RAILROAD RIGHT-OF-WAY WITHOUT A FLAGMAN</li> </ol> </div> | <div> <div>RAIL AMERICA</div> <div>ENGINEERING SERVICES</div> <div>STANDARDS REFERENCE MANUAL</div> </div> | <div> <div>Issue Date: 09-12-2008</div> <div>Revised Date: 02-06-2009</div> <div>Author: [Signature]</div> <div>Checked: [Signature]</div> </div> | <div> <div>THE MATERIAL AND METHOD OF CONSTRUCTION OF THIS STANDARD MUST BE SUBMITTED IN WRITING AND APPROVED BY THE AGRICULTURAL DIRECTOR OF ENGINEERING SERVICES PRIOR TO USE.</div> </div> | <div> <div>MISCELLANEOUS</div> <div>EXITS 1000</div> </div> | <div> <div>INFORMATION REQUIRED FOR TYPICAL JACK &amp; BORE</div> <div>(CARRIER PIPE NOT UNDER PRESSURE)</div> </div> | <div> <div>ES8090.5</div> <div>BL. 1 OF 1</div> </div> |
|   | <div>TYP DWG</div>                     |  |  |   |   |  |   |   |   |   |  |

# **EXHIBIT 8**



**BALCH & BINGHAM LLP**

Alabama • Georgia • Mississippi • Washington, DC

Matthew F. Carroll  
(205) 226-3451

Attorneys and Counselors  
1901 Sixth Avenue North, Suite 1500  
P.O. Box 306 (35201-0306)  
Birmingham, Alabama 35203-4642  
(205) 251-8100  
(205) 226-8799 Fax  
www.balch.com

(205) 488-5666 (direct fax)  
mcarroll@balch.com

May 14, 2010

**VIA E-MAIL**

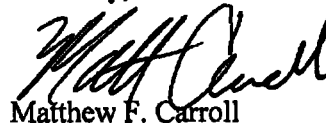
Mr. John DeBuys  
Burr & Forman LLP  
420 North 20th Street, Suite 3400  
Birmingham, AL 35203

RE: Probate Case No. 2009-279, *Utilities Board of the City of Sylacauga v. Eastern Alabama Railway, Inc.*, in the Probate Court of Talladega County, Alabama.

Dear John:

Please let this letter serve as written notice that the Utilities Board of Sylacauga ("Utilities Board") intends to begin construction/installation on the easements obtained in the above condemnation matter on or after May 24, 2010. With this letter, I am forwarding the Utilities Board's plans for the proposed pipelines. Please let me know if EARY has any comments or concerns.

Sincerely,



Matthew F. Carroll

MFC:tsl  
Enclosures  
cc: Mr. W. T. Campbell, Jr.

# EXHIBIT 9

•



Search

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Contact Us

Site Map

About Us

Investors

Customer Console

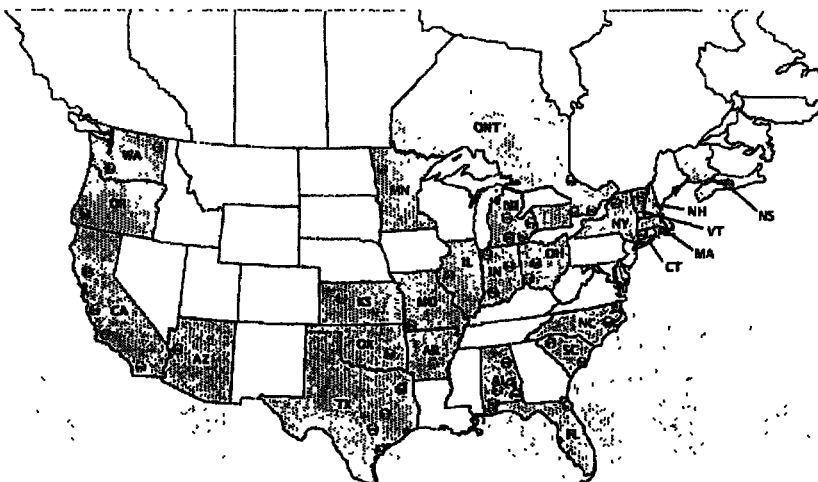
Rail Services

Careers

Real Estate

Industrial Dev.

## RailAmerica Real Estate Service Locations



### General Information:

**Kathy Petroglou**  
**Administrator - Real Estate**  
**Office: (904) 638-6346**  
**Fax: (904) 266-0564**  
**kathy.petroglou**  
**@railamerica.com**

### Railroad Real Estate Information

Available Real Estate services vary by individual railroads. Please choose the railroad below to view the services offered.

Choose a Railroad

## Real Estate

RailAmerica Real Estate can assist you with the purchase, sale, lease, and management of RailAmerica real estate. We also are responsible for contract and deed preparation that is related to our real estate portfolio. RailAmerica, Inc., a leading short line and regional rail service provider with 43 short line and regional railroads, operating approximately 7,400 miles in the United States and Canada. The Company's railroads operate in 27 states and three Canadian provinces. Use the table below to determine what inquiry or service suits your needs and follow the links to learn more and start the application process.

### Property Purchases

Sell or Purchase property that you've determined RailAmerica owns or controls

### Lease of Track/Industrial Track Agreements

Lease track for your transloading, intra-plant switching/interchange, storage and repair needs. RailAmerica offers several types of track leases depending upon ownership, regulatory and maintenance requirements.

### Land Leases

Lease land for various purposes. Land can be leased for many commercial, industrial, agricultural, and private usage.

### Utility Occupancies

Pipelines, wire lines and cable crossings that go over, under and on railroad property.

### Grade Crossings

Public and Private road crossings over RailAmerica tracks.

### Accessing Property

Access RailAmerica property for digging, surveys, drilling, soil sampling and monitoring. Permissions and right of entry permits are required before entering railroad property.

### Insurance Requirements

When working within the railroad right of way of RailAmerica's properties, applicants are required to provide proof of Railroad Protective Liability Insurance.

# **EXHIBIT 10**



10R0167 I

5. Shortly after we discovered the line, a railroad pickup truck came down the track. It was moving very fast. We yelled for the truck to stop, and it came to a stop approximately ten feet after running over the broken pieces of wire.

6. We then repaired the wire and were back at the Utility Board's warehouse by 12:45 p.m..

7. This was an emergency outage situation. We did not know the location of the problem, or that it was near the railroad tracks, until we got out on site and patrolled the line. As such, we could not have known to call for a flagman in advance. Further, we would not have had to go onto the railroad track to splice the line but for the railroad crew's actions in driving over the line.

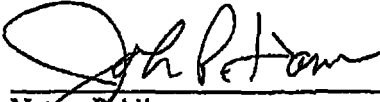
8. The total amount of time we spent in repair, from notification of outage, through travel to the vicinity of the problem, to repair, and return to the warehouse was less than ninety (90) minutes. The amount of time we spent near the railroad tracks was minimal. I saw no interference with the railroad's operations from our work.

Further Affiant sayeth not.

This the 20th day of January, 2010

  
ARTHUR A. WILLIAMSON

SWORN TO AND SUBSCRIBED  
BEFORE ME, this 20<sup>th</sup> day of January 2010.

  
Notary Public  
My Commission Expires: 6-19-12

# **EXHIBIT 11**

**In The Matter Of:**  
**UTILITIES BOARD OF THE CITY OF SYLACAUGA**  
**v.**  
**EASTERN ALABAMA RAILWAY, LLC, ET AL.**

**CV-2010-00228**

---

**LARRY NORDQUIST**  
**August 10, 2011**

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**THE HIGHEST QUALITY IN COURT REPORTING**

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**One Federal Place, Suite 1020 • 1819 Fifth Avenue North • Birmingham, Alabama 35203**  
**www.TylerEaton.com**

Page 1

IN THE CIRCUIT COURT OF TALLADEGA COUNTY,  
ALABAMA

CIVIL ACTION NO. Cv-2010-00228

UTILITIES BOARD OF THE CITY OF SYLACAUGA,  
Plaintiff,

vs.

EASTERN ALABAMA RAILWAY, LLC, et al.,  
Defendants.

DEPOSITION  
OF  
LARRY NORDQUIST  
August 10, 2011

REPORTED BY: Laura H. Nichols  
Certified Realtime Reporter,  
Registered Professional  
Reporter and Notary Public

Page 3

A P P E A R A N C E S

FOR THE PLAINTIFF:

Mr. Matthew F. Carroll  
Attorney at Law  
Balch & Bingham LLP  
1901 6th Avenue North  
Suite 1500  
Birmingham, Alabama 35203  
205.251.8100  
mcarroll@balch.com

FOR THE DEFENDANTS:

Mr. John F. DeBuys, Jr.  
Attorney at Law  
Burr & Forman LLP  
3400 Wachovia Tower  
Birmingham, Alabama 35203  
205.251.3000  
jdebuys@burr.com

Page 2

S T I P U L A T I O N

IT IS STIPULATED AND AGREED,  
by and between the parties, through their  
respective counsel, that the deposition of  
LARRY NORDQUIST may be taken before Laura  
H. Nichols, Commissioner, Certified  
Realtime Reporter, Registered Professional  
Reporter and Notary Public;

That the signature to and  
reading of the deposition by the witness  
is waived, the deposition to have the same  
force and effect as if full compliance had  
been had with all laws and rules of Court  
relating to the taking of depositions;  
That it shall not be necessary  
for any objections to be made by counsel  
to any questions, except as to form or  
leading questions, and that counsel for  
the parties may make objections and assign  
grounds at the time of trial, or at the  
time said deposition is offered in  
evidence, or prior thereto.

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I N D E X O F E X A M I N A T I O N

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EXAMINATION BY MR. DEBUYS 158

I N D E X O F E X H I B I T S

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Plaintiff's Exhibit 3 45  
Plaintiff's Exhibit 4 119

1 (Pages 1 to 4)

Tyler Eaton Morgan Nichols & Pritchett, Inc.

Toll Free 800.458.6031

<http://www.TylerEaton.com>

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Page 7

1 I, Laura H. Nichols, a  
2 Certified Realtime Reporter and Registered  
3 Professional Reporter of Birmingham,  
4 Alabama, and a Notary Public for the State  
5 of Alabama at Large, acting as  
6 Commissioner, certify that on this date,  
7 pursuant to Rule 30 of the Alabama Rules  
8 of Civil Procedure and the foregoing  
9 stipulation of counsel, there came before  
10 me at the offices of Burr & Forman LLP,  
11 3400 Wachovia Tower, Birmingham, Alabama,  
12 on August 10, 2011, commencing at 1:40  
13 p.m., LARRY NORDQUIST, witness in the  
14 above cause, for oral examination,  
15 whereupon the following proceedings were  
16 had:

17  
18 LARRY NORDQUIST,  
19 being first duly sworn, was examined and  
20 testified as follows:

21  
22 EXAMINATION BY MR. CARROLL:

23 Q. Mr. Nordquist, if you would,

1 Q. Okay. Do you remember  
2 generally what the subject matter was?

3 A. Actually, no, I don't.

4 Q. Well, since it has been a  
5 while since your last deposition, I will  
6 just sort of briefly go over the ground  
7 rules. You probably talked to Mr. DeBuys  
8 about them before we started but just so  
9 that we understand each other.

10 A. Okay.

11 Q. As you know, the court  
12 reporter here is here to take down  
13 everything that we say, so it is important  
14 that we not talk over each other.

15 A. Okay.

16 Q. I am going to try and wait and  
17 try to be patient and let you finish an  
18 answer before I start asking another  
19 question. And by the same token, I would  
20 ask that you wait and not start answering  
21 my question until I am done at phrasing  
22 it, okay?

23 A. Okay.

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Page 8

1 go ahead and state your full name for the  
2 record.

3 A. Larry Carl Nordquist.

4 Q. And what is your current  
5 address, Mr. Nordquist?

6 A. 195 Brandy Lane, Harpersville,  
7 Alabama 35078.

8 Q. I know we have met before.  
9 But for the record, my name is Matt  
10 Carroll. I am an attorney for the  
11 Utilities Board of Sylacauga for the  
12 condemnation case we previously had  
13 together.

14 Have you ever been deposed  
15 before?

16 A. Yes.

17 Q. How many times?

18 A. Once that I can remember.

19 Q. When was that, if you recall?

20 A. I don't know the exact date.  
21 I would say over six years ago.

22 Q. Just been a while?

23 A. Yeah.

1 Q. If I ask you a question you  
2 don't understand, let me know. I will try  
3 and clear it up.

4 A. Okay.

5 Q. Are you on any medications or  
6 do you have any conditions that would  
7 prevent you from truthfully answering my  
8 questions today?

9 A. No.

10 Q. If you need to take a short  
11 break, let me know. I can't keep you here  
12 as a prisoner.

13 A. Okay.

14 Q. Can you tell me where you are  
15 currently employed?

16 A. I am employed with Eastern  
17 Alabama Railway.

18 Q. And how long have you worked  
19 there?

20 A. Seventeen years.

21 Q. What is your current title?

22 A. Current title is assistant  
23 general manager.

2 (Pages 5 to 8)

| Page 9   | Page 11  |
|--|--|
| <p>1 Q. And how long have you had that<br/>2 title?<br/>3 A. Honestly, I don't know. I was<br/>4 general manager, and we were bought out by<br/>5 another company. And the size of the<br/>6 railroad made it an assistant versus a<br/>7 general.<br/>8 Q. Job duties were the same, just<br/>9 a slightly different title?<br/>10 A. Same, yeah. Just more letters<br/>11 on the card.<br/>12 Q. Right. When did that buyout<br/>13 occur?<br/>14 A. About seven years ago.<br/>15 Q. I take it this was when<br/>16 RailAmerica acquired East Alabama Railway?<br/>17 A. Correct.<br/>18 Q. So when RailAmerica acquired<br/>19 East Alabama, they changed your title to<br/>20 assistant general manager?<br/>21 A. That's correct.<br/>22 Q. Any change in job duties?<br/>23 A. None at all.</p> | <p>1 used to.<br/>2 Where did you work before you<br/>3 joined East Alabama Railway in<br/>4 approximately 1994?<br/>5 A. I worked for a railroad called<br/>6 Longview, Portland &amp; Northern Railroad in<br/>7 Oregon and Washington states, both of<br/>8 them.<br/>9 Q. And how long were you with<br/>10 Longview, Portland &amp; Northern?<br/>11 A. You are going to make<br/>12 me figure it. I started in 1972. What,<br/>13 thirty-four years? I can't add.<br/>14 Q. 1994. So it would be<br/>15 thirty-two years, I guess.<br/>16 A. Thirty-two.<br/>17 Q. Did you work anywhere before<br/>18 Longview, Portland &amp; Northern aside from<br/>19 jobs during the summers?<br/>20 A. Worked for a place called<br/>21 Nikolai Door.<br/>22 Q. I take it that is not a<br/>23 railroad.</p>  |
| Page 10  | Page 12  |
| <p>1 Q. How long were you general<br/>2 manager?<br/>3 A. Well, that would be ten years.<br/>4 Q. Who owned East Alabama Railway<br/>5 before RailAmerica?<br/>6 A. A company by the name of<br/>7 StatesRail.<br/>8 Q. And so you were general<br/>9 manager of East Alabama --<br/>10 A. Correct.<br/>11 Q. Has either general manager or<br/>12 assistant general manager been your title<br/>13 with East Alabama Railway for<br/>14 approximately the whole seventeen years<br/>15 you have been employed?<br/>16 A. Correct.<br/>17 Q. Where did you work prior to<br/>18 coming to East Alabama Railway, I guess,<br/>19 in 19 --<br/>20 A. I worked --<br/>21 Q. Let me finish, remember? I<br/>22 will start over. I know. I do it too.<br/>23 It's just something you have got to get</p>    | <p>1 A. No.<br/>2 Q. Is it a construction or<br/>3 building supply manufacturer?<br/>4 A. Door producer.<br/>5 Q. How long did you work there?<br/>6 A. It was about two years.<br/>7 Q. Anywhere else?<br/>8 A. Just part-time jobs like<br/>9 JCPenney's and --<br/>10 Q. Can you tell me what caused<br/>11 you to move from Longview, Portland &amp;<br/>12 Northern in Washington and Oregon state<br/>13 down to East Alabama and Sylacauga,<br/>14 Alabama?<br/>15 A. Well, it is a long story, but<br/>16 a spotted owl flew into Oregon, and the<br/>17 environmentalists shut down the company<br/>18 that owned the railroad. It had to do<br/>19 with the logging industry.<br/>20 Q. That is interesting. Could<br/>21 you tell me your educational background<br/>22 starting with high school and college?<br/>23 A. Twelve years of high school,</p> |

3 (Pages 9 to 12)

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Page 15

1 Fort Vancouver High School, and just some  
2 short classes in college, no college  
3 degrees.  
4 Q. What classes? Where were the  
5 classes you took?  
6 A. They were in emergency medical  
7 in Coos Bay, Oregon.  
8 Q. How did you end up going to  
9 work for the railroads?  
10 A. Father-in-law worked for the  
11 railroad. He got me a start.  
12 Q. I take it when you started at  
13 Longview, Portland & Northern, you were  
14 low man on the totem pole. What was your  
15 original job title?  
16 A. Original was maintenance of  
17 way laborer.  
18 Q. You gradually assumed  
19 positions of more responsibility while you  
20 were at the railroad?  
21 A. Correct. I became president  
22 of the company.  
23 Q. What year did you become

1 him?  
2 A. We started about 10:00ish.  
3 Q. This morning?  
4 A. This morning.  
5 Q. Did you review any documents?  
6 A. Any documents? We went over  
7 two. Actually, I read over two to  
8 familiarize myself.  
9 Q. Do you remember what those  
10 were?  
11 A. The Roadway Workers --  
12 MR. DEBUYS: It is what we  
13 sent you yesterday.  
14 A. -- Engineering --  
15 Q. (BY MR. CARROLL:) So the  
16 RailAmerica's Engineering Safety Rules and  
17 RailAmerica's Roadway Worker Protection  
18 Maintenance of Way Rules, is that what you  
19 reviewed?  
20 A. Correct.  
21 Q. Just for the record, I am  
22 going to go ahead and mark your deposition  
23 notice as an exhibit.

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1 president of that railroad?  
2 A. I am going to give you an  
3 approximate. It would have been in 1978.  
4 Q. So you became president fairly  
5 quickly after you started with the  
6 company, from 1972 to 1978.  
7 A. Correct.  
8 Q. And you were president of the  
9 Longview, Portland & Northern from 1978  
10 until you left in 1992?  
11 A. Correct.  
12 Q. Mr. Nordquist, could you tell  
13 me what you did to prepare for your  
14 deposition today?  
15 A. We went over the -- what was  
16 going to take place as far as question and  
17 answers. We went over a couple of --  
18 Q. Mr. DeBuys said to tell you  
19 not to tell me the substance of what you  
20 discussed. Just tell me generally who you  
21 met with.  
22 A. Yeah. Just Mr. John DeBuys.  
23 Q. How long did you meet with

1 (Whereupon, Plaintiff's  
2 Exhibit 1 was marked for  
3 identification.)  
4 Q. (BY MR. CARROLL:) I don't  
5 know if you have seen this before. I sent  
6 it out yesterday. All it does is indicate  
7 that we are taking your deposition today.  
8 There's not a document request with it.  
9 But you understand you are here  
10 to testify in that matter today?  
11 A. Correct.  
12 (Whereupon, Plaintiff's  
13 Exhibit 2 was marked for  
14 identification.)  
15 Q. (BY MR. CARROLL:) Let me show  
16 you what I have marked as Exhibit 2 to  
17 your deposition, which is Eastern Alabama  
18 Railway's interrogatory responses in this  
19 case. Have you ever seen this document  
20 before?  
21 A. Correct.  
22 Q. You have seen it before?  
23 A. Or one similar.

4 (Pages 13 to 16)



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Page 19

1 Q. Do you remember when you saw  
2 it?  
3 A. No, I don't.  
4 Q. Do you remember being involved  
5 in helping prepare the answers for these  
6 interrogatories?  
7 A. Yes.  
8 Q. Can you just sort of generally  
9 describe your involvement? Did you  
10 provide the information for some of these?  
11 Did you review them?  
12 A. Some of them I was asked if I  
13 could answer the question.  
14 Q. Do you remember which ones  
15 those were? I know it has probably been a  
16 while.  
17 A. It has been a while.  
18 Q. Take a minute and just look  
19 over it real quick, see if you can refresh  
20 your memory.  
21 (Pause.)  
22 A. Okay.  
23 Q. (BY MR. CARROLL:) Do you

1 about are not deemed within that.  
2 Q. (BY MR. CARROLL:) And that  
3 was what --  
4 A. Not within that area, correct.  
5 Q. Right. How many switching  
6 yards do you have?  
7 A. We actually have two, one at  
8 the north end and one at the south end,  
9 which would be Talladega, and the south  
10 end being Railroad -- Gantts Quarry, which  
11 is in Sylacauga or part of Sylacauga.  
12 Q. I take it in those two areas  
13 you have got regular train activity, cars  
14 being moved, locomotives pushing cars,  
15 that sort of activity. Is it more or less  
16 on a continuous basis or is it five times  
17 during the day or is there any way to  
18 estimate how much activity is going on in  
19 those two areas?  
20 A. In the southern area, it would  
21 be constant, 24/5 days a week. In the  
22 northern area, it would be once a day five  
23 days a week for Eastern Alabama Railway

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1 remember any particular question that you  
2 provided the answer to?  
3 A. Yes.  
4 Q. Which ones?  
5 A. Number 2.  
6 Q. Okay.  
7 A. Number 6. I think those are  
8 the only two.  
9 Q. In your answer Number 2 or  
10 rather EARY's answer to Interrogatory  
11 Number 2, it indicates that the trains or  
12 EARY's train travels down tracks twice a  
13 day five days a week. Is that still  
14 accurate?  
15 A. It is accurate on the -- one  
16 area but not in the switching yards.  
17 Q. And for us nonrailroad people,  
18 what is a switching yard?  
19 A. A switching yard would be  
20 where the trains sort out the cars to take  
21 into the plants to be loaded or unloaded.  
22 MR. DEBUYS: It may help you  
23 that these two parcels that we are talking

1 and twice a day for CSXT.  
2 Q. Okay. I think as your counsel  
3 just indicated, the two parcels that the  
4 Utilities Board is condemning this action,  
5 neither of those parcels are in these two  
6 switching areas, correct?  
7 A. Correct.  
8 Q. So aside from these two  
9 switching areas, the rest of the track, is  
10 the answer in Interrogatory Number 2 still  
11 accurate, that a train travels up the  
12 tracks once a day and travels back down  
13 the tracks once a day?  
14 A. Correct.  
15 Q. Your interrogatory response  
16 indicates that railroad usage is  
17 anticipated to increase by twenty-five  
18 percent in the near future based on  
19 additional customers. What additional  
20 customers?  
21 A. IKO.  
22 Q. When IKO comes online, is that  
23 going to result in additional train trips

5 (Pages 17 to 20)

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1 up and down the tracks from Sylacauga to  
2 Talladega or is it going to just result in  
3 additional cars being added to the current  
4 one train?  
5 A. It could add additional days  
6 to the week.  
7 Q. So instead of just Monday  
8 through Friday, it may add Saturday and  
9 Sunday?  
10 A. And Sunday.  
11 Q. But it still is only going to  
12 be one train going up in the morning and  
13 coming back down in the afternoon?  
14 A. That is our initial plan, you  
15 know.  
16 Q. Right.  
17 A. That could change.  
18 Q. But at least right now, that  
19 is the plan?  
20 A. Correct.  
21 Q. Just so I understand how all  
22 this works, the principal switching  
23 yard -- this is just a general EARY

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1 operations question.  
2 A. Correct.  
3 Q. The principal switching yard  
4 for EARY is around Sylacauga in the Gantts  
5 junction, Gantts Quarry area, correct?  
6 A. Correct.  
7 Q. And the way the railroad works  
8 is the railroad loads up cars in the  
9 Sylacauga area sometime in the morning or  
10 the prior evening and then sends a train  
11 from Sylacauga north to Talladega to this  
12 other switching yard that you indicated is  
13 in the Talladega area, correct?  
14 A. Correct.  
15 Q. And they unload their cars.  
16 The switching yard in the Talladega area,  
17 does it adjoin or is it connected to an  
18 interstate line?  
19 A. It is an interchange point for  
20 CSX. In other words, we give the cars to  
21 CSX. They in turn give us back empty cars  
22 to --  
23 Q. And then CSX will take over

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1 the cars and they will move it to an  
2 interstate line. Then it can go anywhere  
3 from the country from there?  
4 A. Correct.  
5 Q. That is how the factories and  
6 the manufacturers and the quarries down in  
7 the Sylacauga area ship their goods to  
8 wherever market they are going to ship  
9 them to?  
10 A. Correct.  
11 Q. Now, when the train makes the  
12 trip in the morning, how long does the  
13 trip up the tracks from Sylacauga to  
14 Talladega usually take?  
15 A. The trip takes about two to  
16 two and a half hours from Sylacauga to  
17 Talladega.  
18 Q. Is it the same amount of time  
19 coming back or is it quicker because the  
20 cars aren't full?  
21 A. It's the same time because of  
22 the speed limit.  
23 Q. Is there a set speed limit the

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1 whole length of the track or is it  
2 different speed limits in different areas?  
3 For example, is it slower in downtown  
4 Sylacauga versus outside, or is it all --  
5 A. It is the same the whole  
6 track.  
7 Q. What is the speed limit?  
8 A. Ten miles an hour.  
9 Q. That explains why it takes two  
10 and a half hours. I think I can make that  
11 trip in thirty.  
12 A. Yeah.  
13 Q. The morning trip, is there a  
14 set time that the train always leaves or  
15 is it an approximate time?  
16 A. It varies. The crew goes on  
17 duty at a set time. But it is according  
18 to how much work they have to do prior to  
19 leaving.  
20 Q. What time does the crew go on  
21 duty?  
22 A. The crew that goes to  
23 Talladega?

6 (Pages 21 to 24)

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1 Q. Yes.  
2 A. They go on duty at 1800 hours.  
3 6:00.  
4 Q. 6:00 p.m.?  
5 A. (Nodding.)  
6 Q. You can tell I was never in  
7 the military. How long is their shift?  
8 A. By law they can work up to  
9 twelve hours.  
10 Q. So they work twelve-hour  
11 shifts?  
12 A. Ten to twelve.  
13 Q. So the crew is going to be on  
14 duty. That crew, the Sylacauga crew, is  
15 that what you call it, the Sylacauga crew?  
16 I take it you have got more than one crew.  
17 A. Correct. The crew has a name  
18 and a number. And I will give it to you,  
19 and then I will explain it. It is the  
20 GAM -- no, excuse me, I am wrong. It is  
21 the EAMGATA and then the particular date.  
22 So if you want to put XX in there. So it  
23 is stands for Eastern Alabama Merchandise/

1 in my head that it left in the morning,  
2 but that helps me. Okay. Is the reason  
3 y'all leave at night because there's less  
4 road traffic or is there another reason?  
5 A. The reason, the first shift  
6 works the day job, and they switch cars  
7 out and prepare for the crew at night.  
8 During the day, the maintenance crews work  
9 the tracks.  
10 Q. I know there's not a set time,  
11 but on average from the time the rail crew  
12 reports to work at 6:00, how long does it  
13 usually take for them to get the train  
14 started on the trip north to Talladega?  
15 A. Two to two and a half hours.  
16 Q. Now, the train that comes back  
17 down from Talladega, does the same crew  
18 drive that train back after the cars are  
19 taken off?  
20 A. Correct.  
21 Q. So they will usually leave  
22 around 8:00 p.m. and it will take two to  
23 two and a half hours to get to Talladega.

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1 Gantts Junction to Talladega.  
2 Q. Okay.  
3 A. And the only thing that  
4 changes daily would be the date.  
5 Q. That is the XX designation?  
6 A. Yeah.  
7 Q. If they go on duty at 6:00  
8 p.m. and work ten to twelve hours, are  
9 they going to be the one that takes the  
10 train north to Talladega?  
11 A. They are the one that takes  
12 the train north to Talladega and then  
13 back.  
14 Q. Okay. So they leave sometime  
15 fairly early in the morning, sometime  
16 before 6:00 a.m., I take it?  
17 A. No, 1800 hours, they go to  
18 work at night that takes the train to  
19 Talladega.  
20 Q. The train to Talladega leaves  
21 at night?  
22 A. Correct.  
23 Q. Okay. For some reason I had

1 How long does it normally take for the  
2 cars to get switched out in the Talladega  
3 yard?  
4 A. I would say an hour to an hour  
5 and a half. There are certain Federal  
6 inspections.  
7 Q. And then after that, they will  
8 make the return trip back to Sylacauga?  
9 A. Correct.  
10 Q. They usually arrive back in  
11 Sylacauga around 3:00 a.m., 2:00 a.m. to  
12 3:00 a.m.?  
13 A. 1:00 to 3:00.  
14 Q. Is there ever any reason that  
15 that schedule was changed, the train  
16 travels up to Talladega during the daytime  
17 as opposed to the night?  
18 A. Correct. If CSX has not  
19 delivered, then that crew will leave and  
20 drive back home and leave the train up  
21 there until CSX delivers. Then another  
22 crew would go up and pick it up and then  
23 come back.

7 (Pages 25 to 28)

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1 Q. How often does that happen?

2 A. Quite frequently, as right now  
3 our -- CSX is under a curfew, so they are  
4 not making the run as often. So we have  
5 to leave locomotives at Talladega to bring  
6 it back. So in the last week, two times.

7 Q. In a given month, is that --

8 A. Probably two times in a given  
9 month or less.

10 Q. You said CSX is under a  
11 curfew. What does that mean?

12 A. That means that they are  
13 working on their tracks and they run their  
14 maintenance crews during the day and they  
15 run their trains only at night. So  
16 everything that would run in a  
17 twenty-four-hour period would be run in a  
18 twelve-hour period.

19 Q. Do you have any understanding  
20 as to why they are under that curfew?

21 A. Normal maintenance. I mean,  
22 they just come in and take a section of  
23 track, and they can shut it down for

1 in the last week that, because of the CSX  
2 curfew requirement, the train didn't make  
3 its normal return run to arrive at the  
4 yard between 1:00 and 3:00.

5 A. Correct.

6 Q. What time did the train arrive  
7 back those two times?

8 A. Sunday, the train arrived  
9 Monday back in Sylacauga at 10:00. The  
10 other train, 7:00 a.m.

11 Q. So sometime in the mid to late  
12 morning between 6:00 and 10:00 p.m. [sic]  
13 is when -- if the schedule is going to  
14 vary because of CSX's curfew requirements,  
15 the train is probably going to be delayed  
16 between six and eight hours?

17 A. Yeah, that would be correct.

18 Q. You indicated the train is  
19 required to travel at ten miles per hour.  
20 When they reach intersections,  
21 intersections with a roadway, are the  
22 trains required under these rules to sound  
23 a horn or do other sorts of signaling?

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1 twelve hours and make any repairs or put a  
2 new rail or new ties. I don't know  
3 exactly what.

4 Q. But for whatever reason right  
5 now, the CSX trains you normally deal with  
6 are working under this curfew --

7 A. Correct.

8 Q. -- to do some type of  
9 maintenance, repairs?

10 A. Correct.

11 Q. And I take it you don't know  
12 when that curfew is going to end for the  
13 CSX folks that you deal with?

14 A. I know that this one is a  
15 two-day curfew. But they could come up  
16 with another one farther down the line --

17 Q. Yeah.

18 A. -- tomorrow, so --

19 Q. Tomorrow or next year. You  
20 just have to --

21 A. Yeah, you have to maintain  
22 your track, you know, so --

23 Q. Yeah. You indicated two times

1 A. Correct.

2 Q. What are those? What are the  
3 signaling requirements for the train when  
4 it reaches a roadway?

5 A. At ten miles an hour, the  
6 guidelines are fifteen seconds prior to  
7 reaching the crossing they will start  
8 ringing the bell and blow the whistle.

9 Q. Any other requirements that  
10 you can think of in terms of safety,  
11 avoiding collisions?

12 A. I mean, they have to have  
13 their lights -- you know, their lights on  
14 so that --

15 Q. Because they are traveling at  
16 night?

17 A. Well, it doesn't matter.

18 Q. Even during the day, they have  
19 to keep the lights on?

20 A. Correct.

21 Q. What kind of lights do they  
22 have, just a single big light in the front  
23 or is it --

8 (Pages 29 to 32)

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1 A. They have four lights in  
2 front, two headlights and two ditch  
3 lights. I think it is two hundred  
4 thousand candlelight.

5 Q. Again, for us nonrailroad  
6 people, what are ditch lights?

7 A. Ditch lights would be like fog  
8 lights on your car. They are down lower  
9 on the locomotive. Your headlights will  
10 be up at the top and then --

11 Q. Are they designed to spot  
12 people, individuals or people or animals  
13 that might be on the track or anything  
14 lower?

15 A. Yeah, they are designed to  
16 light up the lower part of the track, more  
17 or less to make sure that the track is in  
18 front of you still.

19 Q. Is there some sort of  
20 regulation that the engineer or watchmen  
21 in the locomotive keep a lookout in front  
22 of them for obstructions or cars on the  
23 tracks?

1 parcels that we are talking about, there's  
2 a roadway that passes adjacent or along  
3 with these parcels, the same vicinity,  
4 correct?

5 A. That runs adjacent or crosses?

6 Q. Parallel. So there's a  
7 roadway, and then the parcel we are  
8 talking about runs along the side of the  
9 roadway and crosses the track at Rocky  
10 Mountain Church Road and Oldfield Road.

11 A. Okay. There is a road that  
12 runs somewhat adjacent to it, then it  
13 veers off of it. It starts at Oldfield  
14 and veers off quite a ways at Rocky  
15 Mountain Church. It is probably about  
16 fifteen hundred to two thousand feet away  
17 from it where it -- it is Rocky Mountain  
18 Creek, the road.

19 Are you talking about the  
20 highway, a gravel road?

21 Q. No, I am talking about the two  
22 parcels that the Utilities Board is  
23 condemning in this action.

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1 A. Correct.

2 Q. What specifically is that  
3 requirement?

4 A. It is according to what  
5 territory you are in.

6 Q. Well --

7 A. For the area that we are in,  
8 which would be -- that you are talking  
9 about is track warrant territory.

10 Q. And what does track warrant  
11 territory mean?

12 A. Track warrant territory means  
13 that it is a designated piece of track  
14 that you have to have authorization from a  
15 dispatch center to access that track. You  
16 have sole -- once you get that track  
17 warrant, you have sole occupancy of that  
18 piece of track.

19 Q. And when you say sole  
20 occupancy, you are talking about other  
21 trains being involved?

22 A. Anything.

23 Q. Well, for example, the two

1 A. Right.

2 Q. Those parcels, both of them  
3 run along the highway or road, on the side  
4 of the road.

5 A. I guess I am not  
6 understanding. Is that the gravel road  
7 that you are talking about that runs  
8 parallel or the --

9 MR. DEBUYS: I think he's  
10 saying that the two crossings that were  
11 put in are parallel to the travel portion  
12 of the road that crosses the railroad  
13 line, crosses the tracks.

14 A. Could you draw me a quick  
15 picture because --

16 MR. DEBUYS: You have got the  
17 tracks going this way.

18 A. Correct.

19 MR. DEBUYS: And you have got  
20 a roadway here.

21 A. Right.

22 MR. DEBUYS: Which, by the  
23 way, goes up and connects up with the

9 (Pages 33 to 36)

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1 roadway here. And one of the condemnation  
2 places is there and one of them right  
3 there.

4 A. Correct. Is this the parallel  
5 road you are talking about?

6 Q. (BY MR. CARROLL:) No, it is  
7 actually --

8 A. Parallel is even to it. This  
9 would be a crossing. It wouldn't be  
10 parallel.

11 Q. I was saying that the  
12 utilities were parallel to the roadway,  
13 not to the railroad. They are  
14 perpendicular to the railroad.

15 A. Perpendicular.

16 MR. DEBUYS: It is  
17 perpendicular to the railroad --

18 A. Okay. Parallel to the -- I  
19 have got you.

20 MR. DEBUYS: -- to the  
21 traveling portion of the highway.

22 MR. CARROLL: But you are a  
23 railroad guy. You were thinking of your

1 don't need a warrant to cross the road.

2 A. Correct. Those are public  
3 crossings.

4 Q. So is there any rule or  
5 regulation that the railroad have  
6 somebody, an engineer or someone else,  
7 looking outside the train when it reaches  
8 those two roads to see if there is a car  
9 or a pedestrian on the road?

10 A. There isn't a rule to say  
11 that -- I mean, they are supposed to be  
12 observant, but the whistle and bell and  
13 the cross bucks at the crossings that tell  
14 the vehicles that they are supposed to  
15 stop. But there's nobody out there to  
16 watch it.

17 Q. The engineer is not required  
18 to be up in the top of the locomotive  
19 looking out to see if there's anybody in  
20 the road. You trust that the whistle and  
21 the other devices will notify them that  
22 the train is coming?

23 A. That the train is coming. I

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Page 40

1 road, not mine.

2 A. You were talking about this  
3 gravel road for some reason. Correct. I  
4 understand now. Thank you.

5 Q. (BY MR. CARROLL:) That is  
6 okay. That is fair enough. You were  
7 speaking about your railroad, not my  
8 public road.

9 A. So you are saying parallel to  
10 Oldfield Road and parallel to Rocky  
11 Mountain Road?

12 Q. Right.

13 A. Correct.

14 Q. The two parcels we put in are  
15 parallel to those two roads?

16 A. Correct.

17 Q. And the reason I say that is  
18 you mentioned this was what you called  
19 track warrant territory.

20 A. Correct.

21 Q. But obviously the cars that  
22 pass over Oldfield Road and Rocky Mountain  
23 Church Road at those two points, they

1 mean, you know, he is not to stop at those  
2 crossings.

3 Q. But you said you do instruct  
4 your engineers to be observant?

5 A. Correct.

6 Q. Do the locomotives have  
7 windows that let them see what is in front  
8 of them?

9 A. Correct.

10 Q. Your Interrogatory Number 2  
11 also mentions a maintenance of way  
12 contractor travels the road at least once  
13 a day. Do you see that?

14 A. Correct.

15 Q. What is a maintenance of way  
16 contractor?

17 A. A maintenance of way  
18 contractor is a person that inspects and  
19 repairs problems with the track.

20 Q. And so your answer indicates  
21 they travel the railroad at least once a  
22 day. Is that their general inspection to  
23 make sure that there are no problems with

10 (Pages 37 to 40)

Page 41

Page 43

1 the track?  
2 A. Correct. They will inspect  
3 it. If they find any problems, then they  
4 will come back and, you know, repair it.  
5 Q. Who does EARY use as a  
6 maintenance of way contractor?  
7 A. Steel City Railroad  
8 Construction.  
9 Q. And Steel City Railroad  
10 Construction, do they ride on the tracks?  
11 A. They have a hi-rail truck.  
12 Actually more than one, but --  
13 Q. And a hi-rail truck is  
14 basically a pickup truck with wheels that  
15 are made to run on a railroad as opposed  
16 to a regular roadway?  
17 A. Correct. It actually operates  
18 on both.  
19 Q. And when Steel City does this  
20 daily drive up and down the tracks, they  
21 will actually drive on the tracks in their  
22 hi-rail truck?  
23 A. Correct.

1 sharp S turn.  
2 Q. That could be a problem,  
3 couldn't it?  
4 A. It could be.  
5 Q. So Steel City is going to make  
6 at least one pass every day from Sylacauga  
7 up to Talladega, correct?  
8 A. Correct.  
9 Q. And then they will return back  
10 from Talladega to Sylacauga. And if they  
11 spotted any problems that they didn't feel  
12 like they could fix on the first pass,  
13 they will stop at that point and they will  
14 fix the identified problem?  
15 A. Correct.  
16 Q. Presumably, if the problem is  
17 serious enough that they need additional  
18 equipment or labor, they will place a call  
19 in to the folks back in Sylacauga and have  
20 a second crew or whatever equipment they  
21 need to meet them at the track?  
22 A. Correct.  
23 Q. Now, in the summer, you said

Page 42

Page 44

1 Q. Your answers indicate at least  
2 once a day. Are there days when they  
3 travel the tracks more than once?  
4 A. Correct. First, they will do  
5 an inspection. If they find a problem,  
6 they will either notate it and come back  
7 and fix it, or if it is simple, they will  
8 fix it right then and there.  
9 Then on days during the summer,  
10 they may make another inspection because  
11 of heat, which causes extreme problems on  
12 the track in the hottest part of the day.  
13 Q. What are the problems it  
14 causes?  
15 A. What happens -- no, I  
16 shouldn't. Metal expands with heat.  
17 Q. Okay.  
18 A. And it can cause what they  
19 call a rail kink.  
20 Q. So it --  
21 A. It expands. You have got to  
22 go up, down or out. And if it gets too  
23 hot, the rail will actually kind of make a

1 during extreme heat, they may make a  
2 second trip, I guess, in the midday,  
3 during the hottest part of the day to see  
4 if there's a problem.  
5 A. Correct.  
6 Q. What temperatures do y'all  
7 generally become concerned that you may  
8 start having those problems with the  
9 tracks?  
10 A. Temperatures are over a  
11 hundred degrees on the track. That  
12 doesn't mean that the temperature outside  
13 is a hundred degrees. So it is usually  
14 around ninety, outside temperature.  
15 Q. That track soaks up the heat  
16 and retains it?  
17 A. Yes. And the ties also  
18 contribute to that, the creosote.  
19 Q. When the railroad contractor,  
20 Steel City, makes this trip, how fast do  
21 they travel down the tracks?  
22 A. They can go up to twenty miles  
23 an hour.

11 (Pages 41 to 44)

Page 45

Page 47

1 Q. Are they required to slow down  
2 at roadway intersections?  
3 A. Correct.  
4 Q. Is there a set speed they have  
5 to slow down to?  
6 A. They have to slow down to  
7 almost stopping until they can see that  
8 the crossing is clear.  
9 Q. So it sounds like they have  
10 got some sort of visual inspection  
11 requirement that they have to see that the  
12 roadway is clear before they can drive  
13 through it.  
14 A. Correct.  
15 Q. Are they required to sound a  
16 horn at the intersections like the train?  
17 A. No.  
18 (Whereupon, Plaintiff's  
19 Exhibit 3 was marked for  
20 identification.)  
21 Q. (BY MR. CARROLL:) I am going  
22 to show you what I am going to mark as  
23 Plaintiff's Exhibit 3.

1 A. -- abide by.  
2 Q. In order to comply with  
3 Federal railroad regulations?  
4 A. Correct, yes.  
5 Q. If you take a look at the last  
6 page of the document, which is Page 27,  
7 there's three paragraphs, Number 828, 829  
8 and 830.  
9 A. Correct.  
10 Q. These appear to me to be rules  
11 and regulations that the railroad imposes  
12 on its contractors when approaching road  
13 crossings.  
14 A. Correct.  
15 Q. Now, do these guidelines only  
16 apply to your contractors and not to the  
17 trains themselves?  
18 A. Correct.  
19 Q. And we have already discussed  
20 the guidelines that the trains have to  
21 follow when they approach a roadway.  
22 A. Correct.  
23 Q. Just to be clear, when EARY's

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Page 48

1 A. Okay.  
2 Q. I think we established earlier  
3 that you reviewed this document this  
4 morning.  
5 A. Correct.  
6 Q. Were you familiar with this  
7 document before this morning?  
8 A. Correct.  
9 Q. Can you tell me what this  
10 document is?  
11 A. This is a document that each  
12 of our roadway employees, maintenance way  
13 employees have to take training per the  
14 FRA to become qualified to be a track  
15 inspector or to work in and around the  
16 track area.  
17 Q. Okay. You said the FRA. What  
18 is the FRA?  
19 A. Federal Railroad  
20 Administration.  
21 Q. And this document is a  
22 document that EARY's employees and  
23 contractors have to --

1 trains approach the intersection with  
2 Oldfield Road and Rocky Mountain Church  
3 Road, they are going to be traveling at  
4 ten miles per hour, correct?  
5 A. They should be.  
6 Q. And when the contractors  
7 approach the parcels at Oldfield Road and  
8 Rocky Mountain Church Road, under EARY's  
9 regulations and guidelines, they are going  
10 to have to slow down to close to stopping  
11 until they confirm that those  
12 intersections are clear?  
13 A. Correct.  
14 MR. CARROLL: Let's take a  
15 short break.  
16 (Whereupon, a break was had  
17 from 2:41 p.m. until 2:47 p.m.)  
18 Q. (BY MR. CARROLL:)  
19 Mr. Nordquist, how many employees work for  
20 EARY in Alabama?  
21 A. In Alabama, there are nine  
22 currently.  
23 Q. I guess in terms of

12 (Pages 45 to 48)



# **EXHIBIT 12**



## AlaFile E-Notice

61-CV-2009-900252.00

Judge: WM E HOLLINGSWORTH III

To: CARROLL MATTHEW FRANKLIN  
mcarroll@balch.com

---

# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

EASTERN ALABAMA RAILWAY, INC. V. CITY OF SYLACAUGA UTILITIES BOARD  
61-CV-2009-900252.00

The following matter was FILED on 10/26/2011 2:05:42 PM

**D001 CITY OF SYLACAUGA UTILITIES BOARD  
EMERGENCY MOTION**

[Filer: BURKHOLDER DAVID RANDALL]

Notice Date: 10/26/2011 2:05:42 PM

CLARENCE HAYNES  
CIRCUIT COURT CLERK  
TALLADEGA COUNTY, ALABAMA  
P O BOX 6137  
TALLADEGA, AL 35160

256-761-2102  
clarence.haynes@alacourt.gov

## STATE OF ALABAMA

Unified Judicial System

Revised 3/5/08

61-TALLADEGA - TALLADEGA

☐ District Court☒ Circuit Court

Case



ELECTRONICALLY FILED

10/26/2011 2:05 PM

CV-2009-900252.00

CIRCUIT COURT OF

CV200990025200 TALLADEGA COUNTY, ALABAMA

CLARENCE HAYNES, CLERK

EASTERN ALABAMA RAILWAY, INC. V. CITY OF  
SYLACAUGA UTILITIES BOARD

## CIVIL MOTION COVER SHEET

Name of Filing Party D001 - CITY OF SYLACAUGA UTILITIES BOARD

Name, Address, and Telephone No. of Attorney or Party If Not Represented

DAVID R BURKHOLDER

1901 Sixth Avenue North, Ste 1500

BIRMINGHAM, AL 35203

Attorney Bar No BUR138

☐ Oral Arguments Requested

## TYPE OF MOTION

## Motions Requiring Fee

- ☐ Default Judgment (\$50.00)  
Joinder in Other Party's Dispositive Motion (i.e.  
☐ Summary Judgment, Judgment on the Pleadings, or  
other Dispositive Motion not pursuant to Rule 12(b))  
(\$50.00)
- ☐ Judgment on the Pleadings (\$50.00)
- ☐ Motion to Dismiss, or in the Alternative Summary  
Judgment (\$50.00)  
Renewed Dispositive Motion (Summary Judgment,  
☐ Judgment on the Pleadings, or other Dispositive  
Motion not pursuant to Rule 12(b)) (\$50.00)
- ☐ Summary Judgment pursuant to Rule 56 (\$50.00)
- ☐ Motion to Intervene (\$297.00)
- ☐ Other \_\_\_\_\_  
pursuant to Rule \_\_\_\_\_ (\$50.00)

\*Motion fees are enumerated in §12-19-71(a). Fees  
pursuant to Local Act are not included. Please contact the  
Clerk of the Court regarding applicable local fees

☐ Local Court Costs \$ \_\_\_\_\_

## Motions Not Requiring Fee

- ☐ Add Party
- ☐ Amend
- ☐ Change of Venue/Transfer
- ☐ Compel
- ☐ Consolidation
- ☐ Continue
- ☐ Deposition
- ☐ Designate a Mediator
- ☐ Judgment as a Matter of Law (during Trial)
- ☐ Disburse Funds
- ☐ Extension of Time
- ☐ In Limine
- ☐ Joinder
- ☐ More Definite Statement
- ☐ Motion to Dismiss pursuant to Rule 12(b)
- ☐ New Trial
- ☐ Objection of Exemptions Claimed
- ☐ Pendente Lite
- ☐ Plaintiff's Motion to Dismiss
- ☐ Preliminary Injunction
- ☐ Protective Order
- ☐ Quash
- ☐ Release from Stay of Execution
- ☐ Sanctions
- ☐ Sever
- ☐ Special Practice in Alabama
- ☐ Stay
- ☐ Strike
- ☐ Supplement to Pending Motion
- ☐ Vacate or Modify
- ☐ Withdraw
- ☒ Other EMERGENCY MOTION  
pursuant to Rule EMERGENCY (Subject to Filing Fee)  
MOTION

Check here if you have filed or are filing  
contemporaneously with this motion an Affidavit of  
Substantial Hardship or if you are filing on behalf of an  
agency or department of the State, county, or municipal  
government (Pursuant to §6-5-1 Code of Alabama  
(1975), governmental entities are exempt from  
prepayment of filing fees) ☐

Date

10/26/2011 2:04:47 PM

Signature of Attorney or Party

/s/ DAVID R BURKHOLDER

\*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

\*\*Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

EASTERN ALABAMA RAILWAY, INC., )

Plaintiff, )

vs. )

CITY OF SYLACAUGA UTILITIES BOARD, )

Defendant. )

CIVIL ACTION NO.:  
CV-2009-900252

**EMERGENCY MOTION**

Defendant Utilities Board of City of Sylacauga ("Utilities Board") moves this Court, pursuant to Ala. Code 12-1-7, and pursuant to its general power of supervision over actions pending before it as provided for in Article IV, Section 142(b), Constitution of Alabama, to enter an order authorizing the Utilities Board to make emergency repairs to its fiber optic and underground water line that both cross the railroad track of Plaintiff Eastern Alabama Railway, who, after hours of advance notice and request to allow such repairs to be made, refuses to allow same and threatens to call the Sheriff if the crew of the Utilities Board enters onto its rail corridor to effectuate repairs. In support of this motion, the Utilities Board shows as follows:

1) This action, which was filed by EARY on September 21, 2009, involves a dispute over ownership, usage, occupancy and other matters related to EARY's rail line property rights and the numerous utilities occupancies of the Utilities Board (hereinafter "Occupancies") associated with those rail line property rights.

2) The parties have since mediated the issues involved in this lawsuit and related condemnation proceedings, but are in disagreement over the terms of the Mediation Agreement. Those disagreements have been presented to this Court by way of motions to enforce the

Mediation Agreement from both sides, and the Court has set that matter for hearing on November 21, 2011.

3) On the morning of October 26, 2011, the Utilities Board learned that an overhead fiber optic line that monitors gas and electric distribution and provides control functions had been damaged by a squirrel to the point that it was no longer functioning. This line is located between Highway 280 and Avondale Avenue (at railroad mile marker 547.55) near the electric substation in the City of Sylacauga.

4) This fiber optic line must be repaired immediately. Without the fiber optic line, the Utilities Board cannot remotely control the high pressure gas feed related to that line, cannot perform remote emergency cutoff procedures, and cannot monitor the gas pressures in the line. This presents a public safety and service issue.

5) The Utilities Board contacted local representatives of EARY when they learned of the damaged fiber optic line and requested permission to access EARY's right of way to repair the line, but were told by EARY's local representatives that permission would have to be obtained from counsel for EARY.

6) Counsel for the Utilities Board notified counsel for EARY of the emergency at approximately 0850 hours on October 26, 2011 to coordinate permission to access the right of way for repair purposes. EARY's counsel was informed of the emergency nature of the situation. EARY's counsel was already aware of the situation, likely from their local representative, and stated a conference call with EARY was set for approximately 0900 hours to discuss the matter.

7) At approximately 1100 hours, the Utilities Board learned of a broken underground water line that crosses EARY's right of way at Machen Drive in the City of Sylacauga. Utilities

Board field personnel reported water was coming to the surface in the area of the EARY rail line in that area, but that EARY representatives refused to allow access to the right of way to shut off the broken water line. Counsel for EARY was notified of this additional situation at approximately 1110 hours and permission to access the right of way was sought.

8) Despite repeated communications with counsel for EARY, the Utilities Board did not receive a response to their request until approximately 1150 hours when counsel for the Utilities Board was told to file a motion with the Court if they wanted access to the right of way.

9) Unless the Utilities Board is allowed to access EARY's right of way for purposes of the above-described repairs, the Utilities Board's ability to provide services to the citizens of the City of Sylacauga and, more importantly, protect the public safety with regard to the high pressure gas line associated with the fiber optic line, will be compromised.

10) The Utilities Board may be required in the future to access EARY's right of way to make similar emergency repairs at times when access to the Court is not possible. The Utilities Board therefore also seeks the right to enter the right of way of EARY, upon proper notice to same and in furtherance of public safety, in order to make any other necessary emergency repairs to the Utilities Board's utility crossings involving EARY's right of way that may need to be made between now and the date on which this litigation is resolved.

WHEREFORE, premises considered, the Utilities Board of the City of Sylacauga respectfully moves this Court for an Order, pursuant Alabama Code § 12-1-7, permitting the Utilities Board to access EARY's right of way in order to make the requested repairs in furtherance of justice and in protection of the public safety and welfare.

Respectfully submitted,

/s/ David R. Burkholder

One of the Attorneys for Defendant  
Utilities Board of the City of Sylacauga

**OF COUNSEL:**

W. T. Campbell, Jr.  
Attorney at Law  
400 W. Third Street  
Sylacauga, Alabama 35150

**BALCH & BINGHAM LLP**

James A. Bradford  
Matthew F. Carroll  
David R. Burkholder  
Post Office Box 306  
Birmingham, Alabama 35201-0306  
Telephone: 205-251-8100  
Facsimile: 205-226-8799

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following by electronic AlaFile filing on this the 26<sup>th</sup> day of October, 2011:

John F. De Buys, Jr.  
Turner B. Williams  
Jennifer E. Ziemann  
Burr & Forman LLP  
420 North 20<sup>th</sup> Street, Suite 3400  
Birmingham, Alabama 35203

Robert Rumsey  
Rumsey & Wilkins  
Post Office Drawer 1325  
Sylacauga, Alabama 35150

/s/ David R. Burkholder

OF COUNSEL

# **EXHIBIT 13**



Turner B. Williams  
twilliam@burr.com  
Direct Dial: (205) 458-5205  
Direct Fax: (205) 244-5739

420 North 20th Street  
Suite 3400  
Birmingham, AL 35203-5206

Office (205) 251-3000  
Fax (205) 458-5100

BURR.COM

October 26, 2011

**VIA EMAIL**  
**VIA FACSIMILE**

Honorable William E. Hollingsworth, III  
P.O. Box 541  
Talladega, Alabama 35160

Honorable Julian M. King  
P.O. Box 697  
Talladega, Alabama 35160

**Re: Eastern Alabama Railway v Utilities Board of the City of Sylacauga  
Utilities Board of the City of Sylacauga v Eastern Alabama Railway**

Dear Honorable Hollingsworth and Honorable:

I am informed this morning that the Utilities Board for the City of Sylacauga has a fiber optic cable that is broken and in need of repair at or near mile marker 457.54. I am further informed by counsel for the Utilities Board that the Utilities Board also has a broken water line at or near Third Street and Industrial. Counsel for the Utilities Board contacted me this morning to advise me that the Utilities Board will need access to my client's, the Eastern Alabama Railway, right of way to effectuate the repair of the cable and water line.

As you both are well aware, the parties attempted to mediate our issues and disputes at a court ordered mediation on September 6, 2011. Unfortunately, after the mediation session had concluded, the parties reached an impasse as it related to certain aspects of the settlement which are set out in the various motions filed by both parties and pending before you both.

One aspect of the purported settlement agreement prescribed the custom and practice that the Utilities Board and the Eastern Alabama Railway are to follow when situations such as the one enumerated above arises. However, since the Master License Agreement was not executed by the Utilities Board, the parties have no formal protocol in place to address the current situation and, since the Board previously terminated all agreements to permit their facilities to be on my client's property, there is no permission granted for the utility and the Board continues to refuse to pay my client for any use of its property.

Honorable William E. Hollingsworth, III  
Honorable Julian M. King  
October 26, 2011  
Page 2

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At this point, my client continues to maintain its position that any movement over, across and/or under its right of way by the Utilities Board constitutes a trespass. Hence, without a Master License Agreement in place, my client takes the position that the Utilities Board cannot ingress or egress the railroad's right of way without the appropriate court order and safety components in place.

On behalf of my client, I have advised counsel for the Utilities Board of our position.

Should counsel for the Utilities Board petition the Court for an order to gain access to the railroad's right of way, we respectfully request that I be given notice of any such filing and permission to be heard on the same.

With best regards, I am

Very truly yours,

Turner B. Williams

TBW/elt

cc: David R. Burkholder, Esq.  
Robert L. Rumsey, Esq.

# **EXHIBIT 14**



**UTILITIES BOARD  
City of Sylacauga**

301 N. Elm Ave.  
P. O. Box 207  
Sylacauga, AL 35150  
(256) 249-8501  
September 28, 2011

**UTILITIES BOARD  
OPERATIONS CENTER**  
1414 Edwards St.  
Sylacauga, AL 35150  
(256) 249-0372

Melody Respass  
Alabama Municipal Insurance Corporation  
110 North Ripley Street  
Montgomery, AL 36104

Dear Ms. Respass,

This letter is to confirm our telephone conversation from September 27, 2011; concerning the Board's insurance policy. Specifically we discussed Eastern Alabama Railway which is a Certificate Holder under the Board's insurance policy. Per our conversation, you indicated that if an accident occurred while the Board or its contractors were engaged in construction on the railroad's property or right of way that the coverage provided under the Board's existing general liability policy would apply to such an incident.

Please let me know if my understanding is incorrect.

Sincerely,

A handwritten signature in cursive script that reads "Mike Richard".

Mike Richard  
General Manager

# **EXHIBIT 15**

---

**From:** Melody Respass [mailto:melodyr@amicentral.org]

**Sent:** Thursday, October 27, 2011 9:35 AM

**To:** 'twilliam@burr.com'

**Cc:** John Ham

**Subject:** AMIC - Form CG 24 17 versus AMCGL-100

Sorry about that. Hit the wrong button. Here are the attachments.

Mr. Williams,

John Ham at the Utilities Board of the City of Sylacauga has asked me to contact you in regards to the form that you are requesting, the CG 24 17 (10 01).

Please note that the last time the CG 24 17 was updated was in 2001 as the wording is now a standard part of the Commercial General Liability Coverage Part (AMCGL-100) which is attached to every one of our policies. Because this is now part of the Commercial General Liability Coverage Part (AMCGL-100) attaching form CG 24 17 to a policy would be redundant and unnecessary. Therefore, this is not a form we use.

I have attached a copy of form CG 24 17 and the section from form AMCGL-100 (10. Insured Contract; right hand column of pg 18 and top left corner of pg 19) for your review. Please note that it is the same wording.

If you should have any questions or need anything further please let me know.

Melody Respass

Melody G. Respass, CIC  
Customer Service Representative  
Alabama Municipal Insurance Corporation  
110 N. Ripley, Montgomery, AL 36104  
866.239.2642 ext 4241 or 334.386.4241 Phone  
334.336.3874 Fax

This message was received from inside the company.

This message is confidential. It may also be privileged or otherwise protected by work product immunity or other legal rules. If you have received it by mistake, please let us know by e-mail reply and delete it from your system; you may not copy this message or disclose its contents to anyone. Please send us by fax any message containing deadlines as incoming e-mails are not screened for response deadlines. The integrity and security of this message cannot be guaranteed on the Internet.

# EXHIBIT 16



**UTILITIES BOARD  
City of Sylacauga**

301 N. Elm Ave.  
P. O. Box 207  
Sylacauga, AL 35150  
(256) 249-8501  
October 27, 2011

**UTILITIES BOARD  
OPERATIONS CENTER**  
1414 Edwards St.  
Sylacauga, AL 35150  
(256) 249-0372

Larry Nordquist  
Eastern Alabama Railway, LLC  
2413 Hill Road  
Sylacauga, AL 35150

Dear Mr. Nordquist,

The Utilities Board of the City of Sylacauga ("Utilities Board") agrees to indemnify and hold harmless Eastern Alabama Railway, LLC ("EARY") with regard to any damages caused by the Utilities Board while conducting repairs on October 27, 2011 to overhead fiber optic utilities located between Highway 280 and Avondale Avenue (at or near railroad mile marker 457.55) in the city of Sylacauga, Alabama. The Utilities Board also agrees to indemnify and hold harmless EARY with regard to any damages caused by the Utilities Board while conducting repairs on October 27, 2011 to an underground water line crossing the railroad at Machen Drive in the city of Sylacauga, Alabama.

Sincerely,

A handwritten signature in cursive script that reads "Mike Richard".

Mike Richard  
General Manager

cc: Bill Campbell  
James Bradford



# EXHIBIT 17









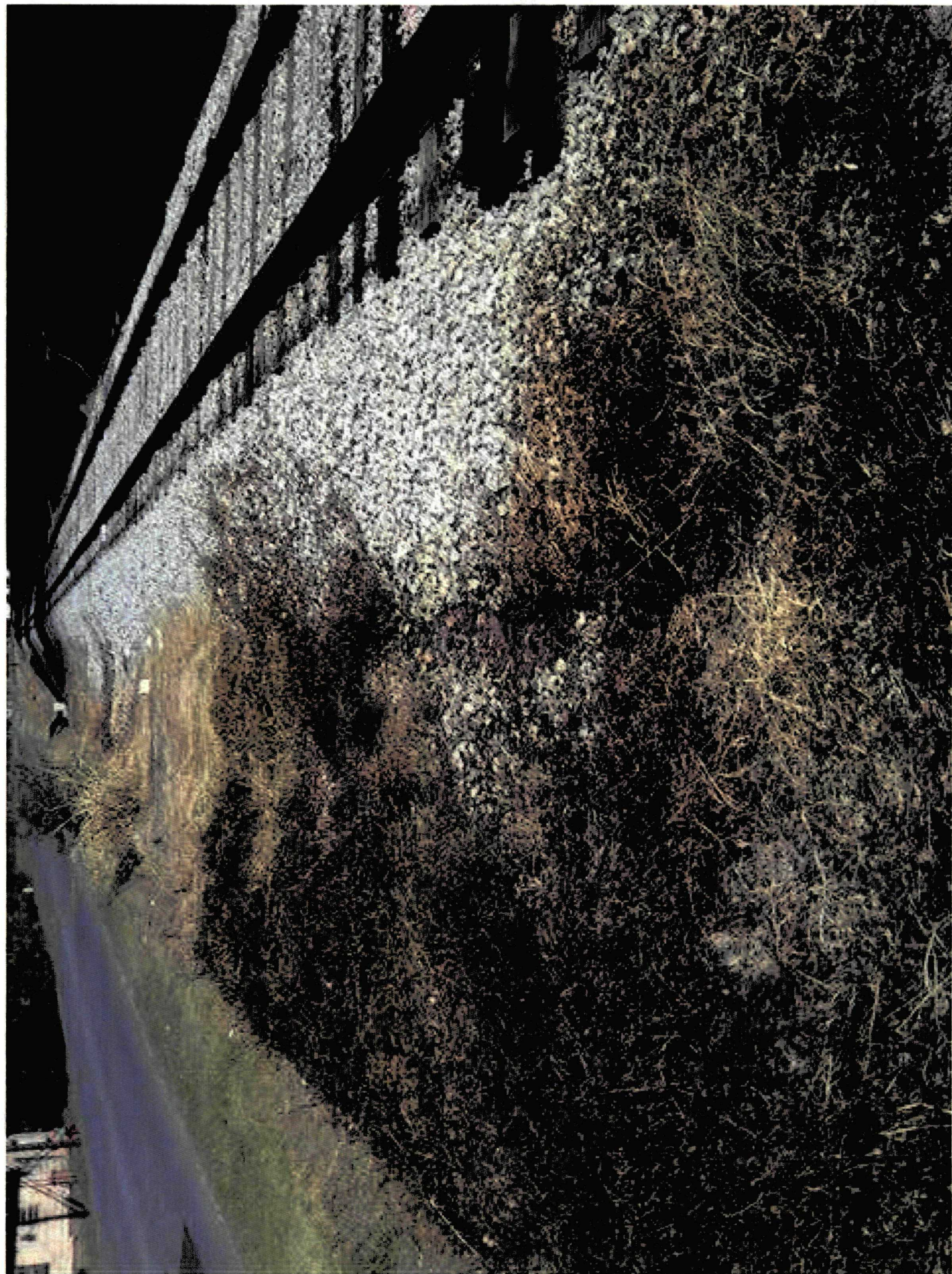






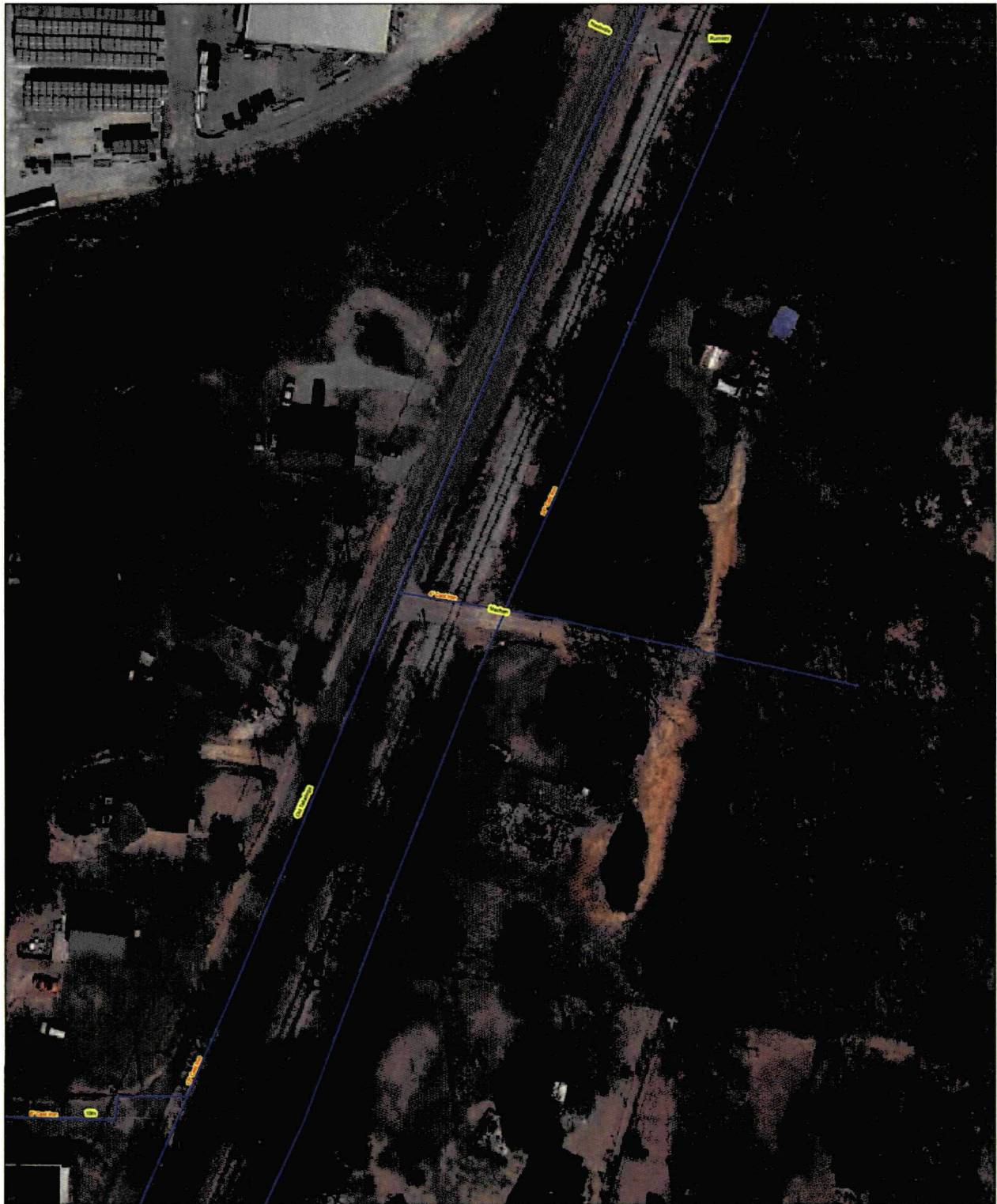






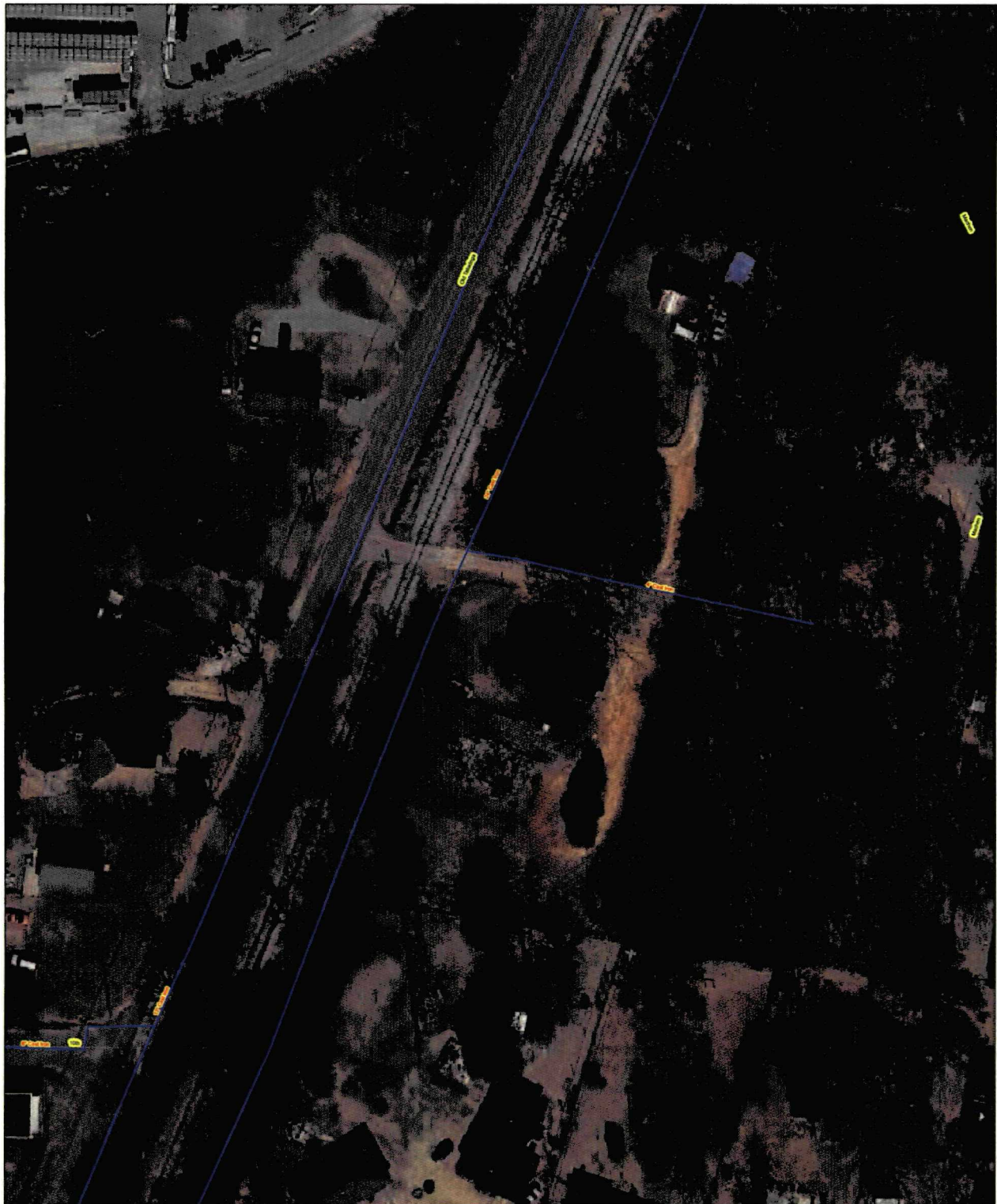


# Machen Water Line As Found



| Legend              |  |
|---------------------|--|
| Street Center Lines |  |
| <b>Main</b>         |  |
| <all other values>  |  |
| <b>SubtypeCD</b>    |  |
| Bypass              |  |
| Distribution Main   |  |
| Exposed Pipe        |  |
| Interconnect        |  |
| Transmission Main   |  |

# Machen Water Line Existing



| Legend              |  |
|---------------------|--|
| Street Center Lines |  |
| <b>Main</b>         |  |
| <all other values>  |  |
| <b>SubtypeCD</b>    |  |
| Bypass              |  |
| Distribution Main   |  |
| Exposed Pipe        |  |
| Interconnect        |  |
| Transmission Main   |  |